REDEFINING CORPORATE SOCIAL RESPONSIBILITY IN AN ERA OF GLOBALIZATION AND REGULATORY HARDENING

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Introduction

As commerce becomes global and the reach and power of multinational enterprises (MNEs) grows, there is an increasing call for corporations to take responsibility for their impacts on stakeholders,[1] and for greater transparency with regard to corporate non-financial risks and environmental and social impacts.[2] The notion that corporations should engage in socially responsible business practices, also known as corporate social responsibility (CSR), has become embedded in the landscape of law[3] and business.[4] CSR has "evolved from a nice-to-have silo to a fundamental strategic priority for businesses large and small."[5] Even as corporations create new and expanded CSR programs, improve CSR reporting,[6] and commit to codes of conduct and other

[1] Exemplified by public outrage and pressure on Western firms after the Rana Plaza factory collapse in Bangladesh or other social or environmental scandals, *see, e.g.*, Julfikar Ali Manik, Steven Greenhouse, & Jim Yardley, *Western Firms Feel Pressure as Toll Rises in Bangladesh*, NY TIMES (Apr. 25, 2013), http://www.nytimes.com/2013/04/26/world/asia/bangladeshi-collapse-kills-many-garment-workers.html and *generally* Lucien J. Dhooge, *The Shirts on Our Backs: Teleological Perspectives on Factory Safety in the Garment Industry in Bangladesh* 33 J. LEGAL STUD. EDUC. 375 (2016); *see also* Nielson, Doing Well by Doing Good 2, 5–6 (June 2014), http://www.nielsen.com/content/dam/nielsenglobal/apac/docs/reports/2014/Nielsen-Global-Corporate-Social-Responsibility-Report-June-2014.pdf (world-wide survey showing strong and growing demand by employees and consumers for corporations to engage in responsible behavior, as well as willingness to pay extra for responsibly-produced goods); Alan Pomering & Sara Dolnicar, *Assessing the Prerequisite of Successful CSR Implementation: Are Consumers Aware of CSR Initiatives?*, 85 J. BUS. ETHICS 285, 285–86 (2009) (pointing to studies showing high consumer expectations for firms to engage in CSR, including 74% of U.K. respondents indicating that information about social and ethical behavior of companies would influence their purchasing decisions).

[2] *See* Giovanna Michelon & Michelle Rodrigue, *Demand for CSR: Insights from Shareholders Proposals*, 35 SOC. ENVTL ACCOUNTABILITY J. 157, 161, 163 (2015) (data from 1996-2009 showing steady increase in all annual proposals related to CSR from 1996-2007, before flattening out after that; proposals related to transparency continued to sharply increase from 2007-2009).

[3] A brief search conducted by authors on January 15, 2017 in the Lexis-Nexus database reveals that from 1986-1996, only 140 law review articles mentioned the term, while from 1996-2006, that number skyrocketed to 717 and more than doubled again from 2006-2016 to 2138. In 2013 the ABA Business Law Section created a subcommittee on Corporate Social Responsibility Law "to advance, support, and facilitate the development of the knowledge, skills, and expertise required to provide informed, insightful, and effective counsel with respect to corporate social responsibility-related legal requirements and business issues." Maggie Hajduk, *New Section Task Force: Corporate Social Responsibility Law*, ABA BUS. L. SEC. NEWS (DEC. 31, 2013), http://www.americanbar.org/groups/business_law/news/2013/12/new_section_taskfor.html.

[4] Susan McPherson, *6 CSR Trends to Watch in 2017*, FORTUNE (Jan. 19, 2017) (describing growth in CSR practices over the past decade as a "stunning transition"), http://www.forbes.com/sites/susanmcpherson/2017/01/19/6-csr-trends-to-watch-in-2017/#147a6af4ece1; *see also* Walter & Shackelford, *Our Mini-Theme: Corporate Social Responsibility is Now Legal*, BUS. L. TODAY (Jan. 2015), http://www.americanbar.org/publications/blt/2015/01/intro.html (introducing the ABA's Mini-Theme on Corporate Social Responsibility with: "Headlines are rife with firms that are 'going green' and otherwise incorporating corporate social responsibility (CSR) into their business practices."); Deborah Doane, *The Myth of CSR*, STAN. SOC. INNOVATION REV. (Fall 2005) (noting growth in CSR and calling it a "highly visible priority for traditional corporate leaders"), https://ssir.org/articles/entry/the_myth_of_csr.

[5] McPherson, *supra* note 4.

[6] PRICEWATERHOUSECOOPERS, CSR TRENDS 2010 2 (2010) (stating "the quantity and quality of corporate social responsibility (CSR) reporting in 2010 makes it obvious that this is not just a passing fad . . . In fact, CSR reports are becoming an integral part of a company's relationship with employees, suppliers, customers, investors, and communities."), http://www.pwc.com/ca/en/sustainability/publications/csr-trends-2010-09.pdf. The number of G250 corporations (world's 250 largest companies by revenue) producing some form of CSR report is now over 90%.

forms of CSR self-regulation,[7] many governments have taken matters into their own hands with regulations that mandate socially responsible behavior and policies intended to further strengthen CSR.[8] This trend to impose formerly voluntary CSR engagement on companies leads to what we call legalization of CSR.[9]

This Article examines how legalization and self-regulation has resulted in the hardening of the formerly self-driven, "soft" CSR concept and the effect this tendency has on the very meaning and practice of CSR.[10] We ask, does this growth in CSR regulation, at both the voluntary and hard law level, really help to further CSR initiatives? Does it tell us anything about how corporations view their moral and ethical responsibility to society, or the way that society views the social responsibility of firms within their midst? Are these regulations effective in addressing CSR, or do they obscure CSR, turning it into window dressing for corporations looking to increase profits and engage in positive messaging?

We find that, while CSR has indeed hardened and become increasingly subject to government intervention in many parts of the world, there is little consensus, within the United States or abroad, as to the basic nature of the social responsibility of companies.[11] In fact, many individuals and firms remain committed to the belief that corporations' *only* social responsibility is to return profits to shareholders (commonly known as shareholder primacy).[12] Based on our survey of current research, corporate activity, law, and regulation in the field of CSR, we find that, contrary to what the growth of CSR and its legalization may suggest, it has in no way undermined the notion of shareholder primacy, and in fact, the legalization of CSR may serve to foster the growth of the shareholder primacy mindset across the globe. While researchers and industry leaders have tried to work within this paradigm by demonstrating that CSR activities are profitable and will ultimately increase firm value,[13] we argue that these efforts may actually undermine the very notion of CSR as a moral or ethical responsibility, and that a new definition and approach to CSR is necessary to restore the perceived legitimacy and efficacy of CSR efforts.[14]

This Article proceeds as follows: in Part I, we consider how definitions of CSR illuminate one of its central conflicts: what exactly *is* the social responsibility of business? By identifying key differences in common definitions, we illustrate the wide variety of beliefs concerning the social responsibility of business, and illustrate how differences in this underlying construct undermine

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KPMG, CURRENTS OF CHANGE 5 (2015), https://assets.kpmg.com/content/dam/kpmg/pdf/2015/11/kpmg-international-survey-of-corporate-responsibility-reporting-2015.pdf (presenting annual survey of corporate social responsibility reporting showing over 90% of G250 produce report; also noting three in five companies report corporate responsibility data in financial reports).

[7] *See infra* Part II.A.

[8] *See infra* Part II.B.

[9] By legalization of CSR we do not mean legalizing what previously was illegal, but imposing CSR on corporations through statutes or regulations; *see also* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401–02 (2000) (defining legalization as a "multidimensional continuum" evolving around obligation, precision and delegation).

[10] The term "hardening" was first used in the international governance literature with respect to the hardening of soft law. *See generally* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010). Soft law consists of rules, standards, principles, and norms of a quasi-legal, non-binding nature that lack formalized sanctions but nonetheless are of legal relevance. *See* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 302 n.29 (2006). Here we use the term "hardening" to describe the gradual process of legalizing CSR.

[11] *See infra* Part I.

[12] *See infra* Part II.A

[13] *See infra* notes 41-44 and accompanying text.

[14] *See infra* Part III.A.

the very notion of CSR and the ability of corporations to engage in successful CSR initiatives. In Part II, we survey trends in CSR public and private regulation in the United States, European Union (EU), China, and India. We describe the hardening of CSR, and how that hardening reflects beliefs about the social responsibility of firms that are unique to different countries and regions. In Part III, we consider the significant differences in social norms and ethical expectations of corporations across societies, and what these norms tell us about the social expectations for firms around the globe. Importantly, we find the process of legalization and hardening has not resulted in greater or more uniform expectations of the social responsibilities of business. Instead, common forms of regulation allow corporations to treat CSR as simply one more means of value creation, ultimately undermining its impact and effectiveness. To address this potential degradation of the very notion of CSR, we offer a new definition of CSR, the use of which we argue would bring greater clarity and effectiveness to the growing field of corporate social responsibility.

I. Defining Corporate Social Responsibility: Contradictions and Conflict

Researchers have noted that a particular challenge of studying CSR is finding commonality among the variety of definitions and contexts in which CSR is used.[15] As one comprehensive review of CSR literature noted, the differences in the way the term is defined and the metrics used to assess it, "often go beyond semantics to deeper construct-level differences . . . from philanthropy to ethics to safety issues to more composite measures assessed by external rating agencies."[16] The differences point to significant conflicts in the most basic understanding of CSR: does it only refer to voluntary behavior, or can it include compliance with government regulations? Does it represent a moral or ethical responsibility, or simply a new tool for branding and building corporate value?

The variety of definitions of CSR go beyond confusing to actually hurting CSR efforts. A lack of uniformity in the definition of CSR undermines efforts to conduct reliable empirical studies, which may in turn hamper efforts by corporations or regulators seeking to move forward with CSR initiatives.[17] Definitions of CSR focused entirely on value creation may also undermine

[15] Max B. E. Clarkson, *A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance*, 20 ACAD. MGMT. REV. 92, 92 (1995) ("A fundamental problem in the field of business and society has been that there are no definitions of corporate social performance (CSP), corporate social responsibility (CSR_1), or corporate social responsiveness (CSR_2) that provide a framework or model for the systematic collection, organization, and analysis of corporate data relating to these important concepts. No theory has yet been developed that can provide such a framework or model, nor is there any general agreement about the meaning of these terms from an operational or a managerial viewpoint."). *See also* M. Rosario Gonzales-Rodriquez et al., *The Social, Economic and Environmental Dimensions of Corporate Social Responsibility: The Role Played by Consumers and Potential Entrepreneurs*, 24 INT'L BUS. REV. 836, 838 (2015) (providing extensive review of variety of definitions of CSR). For a history of the evolution of the term, *see* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268 (1999).

[16] Herman Aguinis & Ante Glavas, *What We Know and Don't Know About Corporate Social Responsibility: A Review and Research Agenda*, 38 J. MGMT. 932, 942 (2012).

[17] *See* Clarkson, *supra* note 15, at 92; John Peloza, *The Challenge of Measuring Financial Impacts from Investments in Corporate Social Performance*, 35 J. MGMT. 1518, 1520 (2009) ("In sum, there are no consistent metrics for measuring CSP, despite three decades of research."); *See* Abagail McWilliams et al., *Corporate Social Responsibility: Strategic Implications*, 43 J. MGMT. STUD. 1, 1, 11 (2006) ("Numerous definitions of CSR have been proposed and often no clear definition is given, making theoretical development and measurement difficult . . . A major impediment to empirical research is the continuing confusion over [the] definition . . . It is impossible to measure what we cannot define and, as long as we use different definitions, we will get empirical results that cannot reliably be compared."). Researchers have noted that corporate managers seeking to engage in CSR may be required

consumer confidence in the authenticity and efficacy of CSR efforts. Studies suggest that consumers are skeptical of the value of CSR activities, and that their skepticism can undermine the success of CSR initiatives.[18] This skepticism may draw from consumers' understanding of CSR as a brand-building, or "greenwashing" activity.[19] Moreover, the trend toward identifying CSR as a mechanism for value creation has the counterintuitive potential to solidify the concept of shareholder primacy, which posits that the corporation *should not have* ethical duties beyond returning profits to shareholders.[20] By defining CSR as a tool for profit maximization, the essential *ethical* nature of social responsibility is negated.

In this section, we start with two interpretations of CSR that have the effect of minimizing or even negating corporations' ethical duty to society: CSR as seen through the lens of shareholder primacy, and CSR as a voluntary effort above and beyond any legal requirements. We follow with a few examples of how CSR has been defined through non-voluntary, moral or ethical terms.

A. CSR and Shareholder Primacy

Do firms have a moral or ethical obligation to society? This basic question, which is central to the definition of CSR, has been explored by business and ethics scholars for decades.[21] Many describe CSR as the notion that business has a moral or ethical responsibility to care for a variety of stakeholders, including employees, and a responsibility to address impacts on the environment and society in which it operates.[22] In his widely cited normative model, Professor Archie Carroll defines CSR as a pyramid of economic, legal, ethical, and philanthropic social responsibilities that businesses should seek to fulfill.[23] The challenge of defining CSR in these normative, ethical, or

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to justify CSR expenditures as likely to provide positive financial returns, yet the lack of accurate and comparable empirical studies have hampered the ability to draw a positive correlation between CSR expenditures and financial performance.

[18] *See* Lois A. Mohr et al., *Do Consumers Expect Companies to be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior*, 35 J. CONSUMER AFF. 45, 59 (2001) (finding 1/3 of sample consumers viewed CSR as "totally self-interested behavior"); Sarah Alhouti et al., *Corporate Social Responsibility Authenticity: Investigating its Antecedents and Outcomes*, 69 J. BUS. RES. 1242, 1242 (2016) (noting that skepticism of CSR "remains and tends to hinder the success of CSR activities"); Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 117–18 (2009) (suggesting that a lack of transparency, trustworthy auditing and adequate disclosures can lead consumers to become skeptical of the value of CSR activities, leading to a "destruction of the market for good CSR practices").

[19] *See* Béatrice Parguel et al., *How Sustainability Ratings Might Deter "Greenwashing": A Closer Look at Ethical Corporate Communication*, 102 J. BUS. ETHICS 15, 15 (2011) ("the profusion of CSR claims, whether well founded or not, creates difficulties for consumers […] to distinguish between […] reputation and rhetoric" [citations omitted]).

[20] *See infra* Part I.A.

[21] A robust number of articles have been dedicated to the history and changing face of CSR and the notion of corporate responsibility generally. *See, e.g.*, Carroll, *supra* note 15; Clarkson, *supra* note 15.

[22] *See* Jonathan P. Doh & Terrence R. Guay, *Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective*, 43 J. MGMT. 47, 54 (2006) ("CSR is the notion that companies are responsible not just to the shareholders, but also to other stakeholders (workers, suppliers, environmentalists, communities, etc."); N. Leila Trapp, *Stakeholder Involvement in CSR Strategy-Making? Clues from Sixteen Danish Companies*, 40 PUB. REL. REV. 42, 43 (2014) ("CSR essentially involves navigating and addressing stakeholder concerns").

[23] *See* Carroll, *supra* note 15, at 289. For an illustration of Carroll's model, *see* E. Christopher Johnson, Jr., *The Important Role for Socially Responsible Businesses in the Fight Against Human Trafficking and Child Labor in Supply Chains*, BUS. L. TODAY 2 (Jan. 2015), http://www.americanbar.org/content/dam/aba/publications/blt/2015/01/full-issue-201501.authcheckdam.pdf.

moral terms, however, is that there is little agreement across or within jurisdictions as to what the limits and boundaries of this moral duty might be.[24]

At a basic level, most would agree that a business has a duty to obey the law.[25] Most would also agree that a for-profit firm has some duty to earn a profit for investors/owners/shareholders.[26] Extrapolating beyond this point, however, brings significant differences of opinion. Is the firm's duty limited to making a profit for owners/shareholders, or does the corporation owe a *broader* moral duty that includes other stakeholders, including employees, customers, communities, and society as a whole? This debate generally reflects the difference between the theory of *shareholder primacy*, the notion that the firm owes its highest and perhaps only moral duty to serve the financial interests of shareholders,[27] and *stakeholder theory*, which holds that the firm owes a broader social duty to a variety of stakeholders who are impacted by corporate activity.[28]

In the US, the split between these competing views of the moral obligation of the firm began in the 1920s, as corporations evolved from closely-held private firms with control resting primarily in their owners, to larger, public entities operated by managers.[29] As firms grew in size and power, many hoped corporations would use that power to aid society and perform functions that had once been performed by government, including the provision of welfare benefits.[30] On

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[24] Professor James Fieser has described a moral obligation as a principle with "majority endorsement within a cultural context." James Fieser, *Do Businesses Have Moral Obligations Beyond What the Law Requires?*, 15 J. BUS. ETHICS 457, 463–64, 465 (1996) (reaching the "cautious conclusion…that the typical business in our society has no moral obligation beyond what the law requires"). This majority endorsement might also be described as a social norm, or commonly agreed upon expectation for moral behavior within a society, without which there can be no expectation of a particular standard of conduct. Fieser explains, "Without a widely recognized system of ethics which is external to the law, supra-legal moral obligations in our society appear to be optional; and, it is unreasonable to expect business people to be obligated to principles which appear to be optional." *Id.* at 463. A variety of scholars have argued that corporations' only moral or ethical duty is to act in the best interest of corporate shareholders. Milton Friedman provides the clearest example of the shareholder primacy perspective, famously stating, "there is one and only one social responsibility of business–to use it resources and engage in activities designed to increase its profits." Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970. A variety of other legal scholars have examined the shareholder primacy theory and the stakeholder theory. *See infra* notes 27–28, 35.

[25] *See* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(B)(1) (AM. LAW INST. 1994) (A corporation "[i]s obliged, to the same extent as a natural person, to act within the boundaries set by law.").

[26] *Id.* § 2.01(A) ("[A] corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.").

[27] *See* David Millon, *Radical Shareholder Primacy*, 10 UNIV. ST. THOMAS L. J. 1013, 1016 ("[S]hareholder primacy instructs management to prioritize shareholder interests over competing non-shareholder interests.").

[28] Stakeholder theory was first articulated by R. Edward Freeman in his seminal work STAKEHOLDER MANAGEMENT: A STAKEHOLDER APPROACH (1984). Freeman did not propose his theory as a legal requirement, but rather as a normative model for effective management, in which corporate managers would assess and take into account the interests of both internal and external stakeholders when making decisions. *See* Andre O. Laplume et al., *Stakeholder Theory: Reviewing a Theory that Moves Us*, 34 J. MGMT. 1152, 1153, 1157–58 (2008). The stakeholder theory of management was later adopted by legal scholars who positioned it in opposition to a shareholder primacy norm, and aligned it with theory that corporations had both a social and profit-driven mission in society.

[29] *See, e.g.*, Gary von Stange, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L. J. 461, 464–67 (1994); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77, 84–87 (2002) (using a historical view of theories of CSR to suggest that views of CSR are a response to other social forces and events, including the Vietnam War and rise in corporate takeovers). The earliest corporations in the United States were in fact non-profit entities that performed a social function, like schools and municipalities. *See* Katharine V. Jackson, *Toward a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L. J. 309, 313–14 (2011).

[30] *See* Wells, *supra* note 29, at 86.

the other hand, some worried that, without regulatory oversight, managers would use their authority to benefit themselves instead of the new and growing class of shareholders.[31] In the 1930s, Professors Adolf A. Berle and E. Merrick Dodd laid out these opposing positions.[32] Professor Berle articulated a broad fiduciary duty on the part of corporate managers to act as a sort of trustee for shareholders, while Professor Dodd took the approach that corporate managers instead owed a broader duty to act on behalf of society as a whole.[33]

In the decades that followed, this distinction became entrenched in the United States.[34] Today, legal treatises dispute whether there is a *legally enforceable* fiduciary duty on the part of corporate managers to serve shareholder interests above the interests of other stakeholders.[35] Perhaps the leading voice against shareholder primacy is Professor Lynn Stout, who has argued that shareholder primacy is neither legally required nor beneficial for investors or society at large.[36] Proponents of stakeholder theory in the business literature argue that maintaining positive stakeholder relationships and considering the corporate impact on stakeholders is both ethical and financially beneficial.[37] On the other hand, advocates of shareholder primacy assert, as did Milton Freedman, that prioritizing shareholder profits is the most economically efficient tactic, and as a

[31] *Id.* at 87–88.
[32] *Id.* at 87–99.
[33] *Id.* at 96. Katharine Jackson posits that a uniquely American focus on property rights, individual ownership, and freedom of contract led to the elevation of the shareholder primacy theory over a more inclusive stakeholder model. *See* Jackson, *supra* note 29, at 320.
[34] In the United States, most would likely agree with Professor Fieser's conclusion that, "[N]o unambiguously and broadly endorsed list of supra-legal business obligations has emerged in the literature on business ethics." Fieser, *supra* note 24, at 464. *See also* Wells, *supra* note 29, at 99–134. Professor Carroll provides a detailed historical analysis of the definition of corporate social responsibility that highlights voices on both sides of this debate at various points in history. *See generally* Carroll, *supra* note 15.
[35] A rich literature explores the origin, enforceability, and debate over the normative quality of the shareholder primacy theory. For a discussion of the shareholder primacy theory, see generally D. Gordon Smith, *The Shareholder Primacy Norm*, 23 IOWA J. CORP. L. 277 (1998); Millon, *supra* note 27, at 1015–106 (describing the development and application of the term shareholder primacy). For the conclusion that the shareholder primacy theory has become a norm in U.S. business, see Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 713, 714 (2001-2002) (describing "mainstream" view that "corporations have no specific social responsibilities beyond profit-maximizing for the benefit of shareholders"); N. Craig Smith and David Ronnegard, *Shareholder Primacy, Corporate Social Responsibility, and the Role of Business Schools*, 134 J. BUS. ETHICS 463, 465 (2016) ("We maintain that the [shareholder primacy norm] is mute as a legal norm while operative as a social norm").
[36] *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); Lynn Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003 (2013).
[37] *See, e.g.*, Jacob Brower and Vijay Mahajan, *Driven to be Good: A Stakeholder Theory Perspective on the Drivers of Corporate Social Performance*, 117 J. BUS. ETHICS 313, 314-315 (2013) (describing history of stakeholder theory and research suggesting that attention to stakeholder concerns is key to long term firm success); Kent Greenfield, *Stakeholder Theory and the Relationships Between Host Communities and Corporations: Defending Stakeholder Governance*, 58 CASE W. RES. 1043, 1046-47, 1063-1064 (2008) (arguing that stakeholder governance is necessary to protect employees and other stakeholders, and is therefore the best regulatory structure from a social welfare perspective); Thomas M. Jones & Andrew C. Wicks, *Convergent Stakeholder Theory*, 24 ACADEMY MGMT REV. 206 (1999) (drawing together normative and instrumental stakeholder theories into a coherent whole); Thomas M. Jones, *Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics*, 20 ACADEMY MGMT REV. 404 (1995) (theorizing that stakeholder theory, as a subset of ethical and economic principles, can provide significant economic advantage).

result the most beneficial to society.[38] Despite this active disagreement, most would agree that, at a minimum, there exists a cultural norm within the U.S. - and to a certain degree also in the U.K. market economy[39] - that the responsibility of business is to increase the profits of shareholders, and that the interests of any other stakeholder groups must be subordinate to this goal.[40]

It requires no great leap of the imagination to see that a conventional notion of corporate social responsibility—which necessarily assumes that corporations have *some* responsibility to society—is incompatible with a strict notion of shareholder primacy. Indeed, viewed through the lens of shareholder primacy, CSR must be defined as a *business strategy* for building the economic value of the firm.[41] In this formulation, CSR can only be justified as a means of building economic value for shareholders, as for example through activities that enhance brand recognition and loyalty or reduce firm costs.[42] While this version of CSR does not ignore concomitant social

[38] Seminal scholars in this area include Berle, Jensen and Meckling, and Easterbrook and Fischel. *See, e.g.*, A.A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932) (arguing that maintaining fiduciary duty to shareholders prevents management from assuming ultimate control and funneling corporate profits to themselves); Michael C. Jensen and William H. Meckling's *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FINANCIAL ECON. 305, 311 (1976) (arguing that the notion that corporations bear some social responsibility is "seriously misleading" because the firm is nothing more than a nexus of contracts among individuals); FRANK H. EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Frank H. Easterbrook & Daniel Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169-1174 (1981) (arguing that rules regarding shareholder wealth maximization are necessary to address agency costs and inefficiencies that can result). For a more modern defense of the shareholder primacy norm, see George W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 CASE W. RES. L. REV. 1107 (2008); Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001); Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, 21 DEL. J. CORP. L. 27 (1996); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply To Professor Green*, 50 WASH. & LEE L. REV. 1423 (1993).

[39] The U.K. government, different from the United States, in recent years has tried to maintain strong shareholder protection against managerial overreach while introducing strong CSR policies leading to what has been labeled enlightened shareholder value. The 2006 U.K. Companies Act extends the fiduciary duty of directors to include stakeholder interests alongside shareholder interests, Companies Act 2006, c.46, pt. 10, c.2, §172 (U.K.), http://www.legislation.gov.uk/ukpga/2006/46/section/172; *see also* Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 500 (2005) (describing the U.K. system as a third way between U.S. shareholder and European stakeholder value).

[40] *See* Roe, *supra* note 38, at 2073 (stating that "[n]orms in American business circles, starting with business school education, emphasize the value, appropriateness, and indeed the justice of maximizing shareholder wealth").

[41] Amiran Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L LAW 452, 462 (2008) (describing CSR as a "business sensitive, if not business-driven practice"); Dimosthenis T. Mousiolis & Apostolos D. Zaridis, *The Effects in the Structure of an Organization through the Implementation of Policy from Corporate Social Responsibility (CSR)*, 148 PROCEDIA: SOC. & BEHAVIORAL SCI. 634, 634 (2014) ("Corporate social responsibility is a business approach that views respect for ethics, people, communities and the environment, as an integral strategy that improves the competitive position of a firm."); Dana Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, 8 WM. & MARY BUS. L. REV. 71, 116 ("[C]ompanies should move from the typical responsive CSR, which tries to address general social impacts through good citizenship or to mitigate harm from value chain activities, to strategic CSR--an affirmative corporate social agenda--which both transforms value chain activities to benefit society and reinforces business strategy and leverage capabilities to improve the broader competitive context.").

[42] Diana-Laure Arjalies & Julia Mundy, *The Use of Management Control Systems to Manage CSR Strategy: A Levers of Control Perspective*, 24 MGMT. ACCT. RES. 284, 284–300 (2013) (distinguishing between one stream of accounting literature, which regards CSR as a means of managing reputation, and another, including the author's work, which uses activities embedded directly in the organization to directly build value).

benefits, those benefits on their own cannot support CSR expenditures. To make CSR palatable to adherents of this business approach, a plethora of scholarly literature in both business and legal journals seeks to prove the economic benefit of CSR policies,[43] and to promote the economic benefits of CSR.[44]

An excellent illustration of this shareholder primacy presumption and its impact on socially responsible business practices can be seen in the creation of "benefit" companies—a new form of for-profit business enterprise that explicitly recognizes and legitimizes the pursuit of social goals alongside profit goals.[45] While some have disputed the legal need for such a form,[46] others have argued that benefit companies are necessary to counter the overwhelming popular consensus that corporations are legally obligated to maximize shareholder profits.[47] The fact that legislation recognizing benefit companies has been pursued in and adopted by 30 states,[48] and that over 3,000 companies have achieved certification as benefit companies,[49] supports the presence of a societal presumption against corporations pursuing social benefits at the expense of the interests of

[43] Rose Schreiber, *Corporate Social Responsibility Is an Essential Strategy in Today's Marketplace*, in CORPORATE SOCIAL RESPONSIBILITY 22, 24 (Margaret Haerens & Lynn M. Zott, eds., 2014) ("the entire premise on which CSR stands has been overtaken by the argument on whether or not it can be linked to financial value and a return on investment"); Brittany T. Cragg, *Home is Where the Halt Is: Mandating Corporate Social Responsibility Through Home State Regulation and Social Disclosure*, 24 EMORY INT'L L. REV. 735, 740–44 (2010) (providing a variety of economic arguments for adopting CSR); Mousiolis & Zaridis, *supra* note 41, at 634 (summarizing evidence from a variety of studies indicating financial benefits related to CSR); Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REV. 85, 85–105 (2010).

[44] *See generally* Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 IOWA J. CORP. L. 647 (2016) (focusing on risks related to environmental, social, and governance factors); LYNN SHARP PAINE, VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE (2003); *see also* Aguinis & Glavas, *supra* note 16, at 940–43 (reviewing and summarizing articles analyzing impacts of CSR on firm performance); Gina Iacona, *Going Green to Make Green: Necessary Changes to Promote and Implement Corporate Social Responsibility While Increasing the Bottom Line*, 26 J. LAND USE & ENVTL. L. 113, 119–24 (2010); Christopher Johnson Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. L. 1083, 1121–22 (2015).

[45] *See* Doug Bend & Alex King, *Why Consider A Benefit Corporation?*, FORBES (May 30, 2014), http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/#5560dba6ea31.

[46] *See, e.g.*, J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 16 (2012) ("[C]ertain social enterprise proponents may have overstated the need for benefit corporation statutes, as existing corporate law. . . already provides significant protection to directors who choose to favor or consider non-shareholder stakeholders in their decisions."); Jessica Chu, *Filling A Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 183 (2012) ("[Shareholder primacy is] a concept founded in the ideas of society and not the law. As such, changing the law by adding benefit corporations cannot successfully counter this societal norm. Instead, adding benefit corporations as an available corporate form will further influence the public perception that shareholder primacy is the law.").

[47] *See, e.g.*, Alexandra Leavy, *Necessity is the Mother of Invention: A Renewed Call to Engage the SEC on Social Disclosure*, COLUM. BUS. L. REV. 463, 465 (2014) ("Governor Jack Markell [of Delaware] remarked that many businesses 'feel understandably constrained by existing corporate law that recognizes only one legitimate corporate purpose--to maximize value for shareholders.' The public benefit corporation will counter the 'plague of short termism' that led our country to financial disaster six years ago by mandating that directors balance the interests of shareholders against the interests of other stakeholders." [citations omitted]).

[48] John Montgomery, *Mastering the Benefit Corporation*, BUS. L. TODAY 1 (July 2016).

[49] *Id.*

shareholders.[50] The existence of the benefit company form suggests that the only CSR that can be practiced in traditional corporations is one dedicated to creating additional corporate profits.

In contrast, social enterprise law pursues a very different function in the EU, where special legal regimes have been put in place for tax reasons, to advance public policy objectives, and to overcome EU competition rules and state aid regulation for social enterprises.[51] Typically these regimes, which at first sight resemble the U.S. benefit company, such as the German equivalent (gGmbH),[52] do not allow for dividend distribution, [53] and therefore, unlike their U.S. counterparts, are not an option for companies pursuing both profit and societal goals. Concerns about social enterprise's management violating shareholder wealth maximization obligations under corporate law are basically absent from the European debate, as continental European legal systems, such as those of Germany or France, but also Japan,[54] acknowledge that directors may manage the firm in the "social interest."[55] The fact that management may pursue corporate goals other than shareholder wealth maximization has been attributed to fundamental differences in the development of corporate legal theory against different cultural backgrounds and economic realities, characterized in legal scholarship as institutionalism versus contractarianism.[56] "In the US, scholars were concerned by the quasi-political, agency-cost driving power of managers, while in Germany, legal scholars . . . were concerned with the position of large shareholders in corporations and with their interference with the proper functioning of management"[57] leading to strong shareholder protection against self-interested management in the United States versus protection of the enterprise and its stakeholders against majority shareholders in Germany.

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[50] Today, many scholars seek to justify the pursuit of social benefits and corporate social responsibility by their positive impacts on shareholders. *See infra* notes 43–44 and accompanying text.

[51] Antonio Fici, *Recognition and Legal Forms of Social Enterprises in Europe: A Critical Analysis from a Comparative Law Perspective* 11 (82/15 Euricse, Working Papers 2015) (describing the identifying function of social enterprise law).

[52] Gemeinnützige Gesellschaft mit beschränkter Haftung, which translates into English from German as public interest limited liability company (translation provided by the authors).

[53] Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GmbHG] [Limited Liability Companies Act] Apr. 20, 1892, REICHSGESETZBLATT [RGBL] at § 4 (2) (Ger.); ABGABENORDNUNG [AO] [FISCAL CODE], § 55 (1) (Ger.).

[54] *See* Roe, *supra* note 38, at 2073 (stating that "in Japan, senior managers rank shareholder profit maximization (more precisely: return on investment and stock price) much lower than do American managers" [citations omitted]); *see generally* Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 U. PA. L. REV. 527 (2001) (analyzing the convergence between U.S. and Japanese corporate law).

[55] *See* Roe, *supra* note 38, at 2072 (stating that "French corporate law allows managers, it is said, to manage their firm in the social interest. [Citation omitted] German law refuses to tell managers that they are their shareholders' agents. [Citation omitted]").

[56] Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in A Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 719 (2011) (identifying a prevalence of concentrated ownership in German companies versus dispersed shareholders in U.S. companies as one of the underlying reasons for the differences between the German and U.S. approach to shareholder primacy); *see also* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 816 (2005) (opposing the U.S./U.K. liberal economy to the German and Japanese corporatist and French statist economies, and describing the correlation between the economic model, the theory of the firm, and impact this relationship has on the prevailing view on CSR in these countries); Roe, *supra* note 38, at 2073–74 (relating shareholder primacy to American cultural preference for selling a successful firm versus family ownership which is passed on between generations in other cultures); Williams & Conley, *supra* note 39, at 494 (opposing the European and Japanese style "insider system" to the U.S. "outsider system").

[57] Gelter, *supra* note 56, at 719.

Corporate law in the countries mentioned above supports a concept of CSR that aligns with stakeholder theory:[58] *i.e.*, as an expression of or commitment to a corporation's relationships with stakeholders.[59] From this perspective "CSR is fundamentally about business holding themselves accountable for their impact on people and the planet. It is a comprehensive approach that a corporation takes to meet or exceed stakeholder expectations beyond measures of revenue, profit, and legal obligations."[60]

While continental European corporate law's predisposal for stakeholder theory continues to shape the academic discourse about CSR,[61] protections for shareholders have steadily increased in the formerly institutionalist-oriented corporate law systems of Germany or France.[62] Under the influence of globalization and internationalization, and the growth of European capital markets, commentators observe an increasing convergence of European corporate law towards contractarianism over the last decades.[63] The influence of the U.K. government and underlying Anglo-American corporate legal theory on European company law-making may also have played a role in this shift.[64] Under the influence of these changing norms in EU corporate governance, the European Commission's most recent definition of CSR weaves together the notion of CSR as a business process to increase value for shareholders and a moral obligation to stakeholders. It calls

[58] *See* Avi-Yonah, *supra* note 56, at 817 (concluding that "CSR is most easy to justify in all its forms on the basis of the real theory of the corporation" prevalent in European countries). *See also* Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 131 (2009) (describing the discourse "that Anglo-Saxon systems either do not take stakeholder interests into account, or do so to a much smaller degree than do Continental systems" as "staple narrative").

[59] *See* Trapp, *supra* note 22, at 43 (explaining that CSR is a means of embodying the standards that stakeholders set for the corporation, utilizing communication as a key tool to facilitate such embodiment); *see also* Margaret Ryznar & Karen E. Woody, *A Framework on Mandating versus Incentivizing Corporate Social Responsibility*, 98 MARQUETTE L. REV. 1667, 1668 (2015) (defining CSR as including "ethical guidelines, incorporation of stakeholder concerns, and efficient internalization of externalized costs" and "incorporation of stakeholder concerns"). Researchers may also refer to corporate social performance (CSP), which has been defined as social and/or environmental programs and policies that relate to a firm's "societal relationships." Peloza, *supra* note 17, at 1519.

[60] Peter Kinder, *The Corporate Social Responsibility Movement Responds to Real Demands for Increased Accountability*, in CORPORATE SOCIAL RESPONSIBILITY 41, 44 (Susan Hunnicutt ed., 2009). While most researchers conclude that the EU favors a stakeholder theory position with regard to CSR, (*see, e.g.*, Williams & Conley, *supra* note 39, at 494) the position of the European Commission has been said to favor a "business case" approach to CSR, in which CSR is justified through reference to increased value for the firm. Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. U. J. INT'L HUM. RTS. 262, 273–74 (2008).

[61] *See e.g.*, Williams & Conley, *supra* note 39; *see also supra* note 60 (and accompanying text).

[62] *See* Philipp Klages, *The Contractual Turn: How Legal Academics Shaped Corporate Law Reforms in Germany* 16–17, http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.133.8021 (last visited Feb. 4, 2017) (pointing towards a series of legal reforms strengthening shareholder protection in Germany); *see also* Gelter, *supra* note 56, at 726–27 (observing a shift from institutionalism to contractarialism in Germany and France starting in the 1990s).

[63] *See* Klages, *supra* note 62, at 11–16 (attributing the shift towards contractarianism in Germany to market realities and the influence of market oriented legal academics on German corporate law reform); *see also* Gelter, *supra* note 56, at 727–28 (attributing the shift to "a growing disillusionment with institutional theories"); Avi-Yonah, *supra* note 56, at 817 (2005) (with references).

[64] Gelter, *supra* note 56, at 727 points towards the example of the U.K. model for mandatory bids in the case of a single shareholder acquiring a controlling stake, which has been introduced into the law of all European Member States via transposal of the EU Takeover Directive.

for corporations to integrate into their "core strategy" a process to maximize "the creation of shared value for their owners/shareholders and for their other stakeholders and society at large."[65]

While this European doctrine of "enlightened shareholder value"[66] imports Anglo-American concepts of shareholder primacy into formerly stakeholder-oriented EU Member States,[67] it at least maintains the presumption that corporations owe some ethical or moral duty to stakeholders. However, the danger in this approach is that, by making the business case for CSR, the moral and ethical duty aspect may ultimately be undermined, contributing to the spreading of shareholder primacy theory across borders.

B. CSR as Voluntarism

A number of governments and academics have defined CSR as voluntary activities undertaken by firms in environmental or social areas.[68] For example, CSR has been defined as actions "taken by the firm…beyond…that which is required by law"[69] and "voluntary actions companies take beyond what is required by law."[70] The European Commission's 2001 Green Paper defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."[71]

As CSR regulation hardens,[72] the voluntarism definition becomes increasingly at variance with the new legal reality. Perhaps for this reason, the European Commission's 2011

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[65] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, at 3.0, COM/2011/0681 final, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52011DC0681 (last visited Feb. 10, 2017).

[66] Williams & Conley, *supra* note 39, at 496 (describing the "enlightened shareholder value" approach as it has been developed in the U.K.).

[67] *See also* Wouters & Chanet, *supra* note 59, at 273-74 (describing the EU Commission's position as "business case" approach).

[68] *See, e.g.*, Paul C. Godfrey et al. , *The Relationships Between Corporate Social Responsibility and Shareholder Value: An Empirical Test of the Risk Management Hypothesis*, 30 STRATEGIC MGMT. J. 425, 427 (2009) ("CSR has been defined . . . as voluntary corporate actions designed to improve social conditions . . . or as corporate actions not required by law that attempt to further some social good and extend beyond the explicit transactional interests of the firm."); Shiro Hori et al., *The Role of CSR in Promoting Companies' Energy-Saving Actions in Two Asian Cities*, 69 ENERGY POL'Y 116, 116 (2014) ("CSR involves actions that extend beyond mere compliance or the fulfillment of responsibilities beyond actions dictated by markets or laws. Thus, CSR can be described as companies' social responsibility to engage in voluntary actions as members of the societies to which they belong."); Nikolay A. Dentchev, *On Voluntarism and the Role of Governments in CSR: Toward a Contingency Approach*, 24 BUS ETHICS: A EUROPEAN REV. 378, 378 (Oct. 2015) ("Corporate social responsibility (CSR) is consistently defined as a voluntary principle that guides societal business activities."); Donald J. Kochan, *Corporate Social Responsibility in a Remedy-Seeking Society: A Public Choice Perspective*, 17 CHAP. L. REV. 413, 415 (2014) (defining CSR activism, in part, as "efforts that seek to convince corporations to voluntarily take into account corporate social responsibility in their own decision-making");.

[69] Doh & Guay, *supra* note 22, at 47.

[70] *See* Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANSNAT'L L. 375, 383 (2013) (describing voluntary compliance as the way CSR "is typically understood"). Harper Ho goes on to note, however, that many have noted that this definition is lacking, acknowledging that "CSR cannot be defined simplistically in terms of distinctions between voluntary tools or 'soft law' on the one hand, and 'hard' enforceable legal mandates on the other." *Id.* at 384.

[71] *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, at 5, COM (2001) 366 final (July 18, 2001), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0366&from=EN.

[72] *See infra* Part II.B.

communication about CSR redefines the term as "the responsibility of enterprises for their impacts on society,"[73] including both adherence to the law and voluntary activities.[74] Still, the notion that CSR is "voluntary" or "beyond law" persists in the U.S. and abroad.[75] While the origin of this notion is unclear, it implies that corporations' actions in following the law are not based on or required by moral or ethical concerns, while "extra-legal" or voluntary actions *are* motivated by or required by such considerations.

Like the alignment of CSR with shareholder primacy, this notion is highly problematic. The law regularly renders involuntary what may otherwise be considered moral and ethical, and allows to be voluntary that which might be considered immoral. For example, laws prohibiting murder, assault, or theft, not to mention fraud, embezzlement, and corruption, all outlaw behavior that most would agree is unethical or immoral. Yet we would be unlikely to say that when individuals refrain from murdering someone, they are not acting out of a sense of social or moral responsibility. On the other hand, a variety of voluntary behaviors may be entirely self-serving, and therefore undeserving of the label "socially responsible." For example, a corporation may build a beautiful outdoor garden that is only available to corporate executives, or contract with an expensive organic beverage supplier that happens to be owned by the CEO, and these behaviors may reflect no commitment to a sense of moral or ethical responsibility. The existence of a legal prohibition or regulation may reflect a societal desire for enforcement, punishment, or even retribution for certain behavior, but say little about whether the behavior itself falls within or outside of ethical norms; alternatively, a lack of prohibition may reflect political exigencies and power dynamics, but say little about social or ethical norms.

As the examples in this Article show, CSR regulation differs greatly between regions, nations, and sometimes States. These differences lead to the paradox that under a "beyond the law" definition of CSR, the same corporate activity – *e.g.* donating food waste, which is a legal requirement for supermarkets in France[76] - would be considered CSR in countries where such regulation does not exist (like other EU countries which do not have such a requirement or the United States), and nothing more than regulatory compliance in France. Consequently, in corporate communications or under certain reporting regimes, which differentiate between voluntary and mandatory activities,[77] companies governed by national laws which set high mandatory CSR standards would be required to report differently than their counterparts from countries with lower standards, putting them at a competitive disadvantage.

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[73] *Supra* note 65.

[74] "Respect for applicable legislation, and for collective agreements between social partners, is a prerequisite for meeting that responsibility." *Supra* note 65.

[75] Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS B. L.J. 175, 175 (2014) (noting "CSR efforts have generally been viewed as voluntary actions undertaken by corporations" while distinguishing new efforts in China and India); Patricia Rinwigati Waagstein, *The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications*, 98 J. BUS. ETHICS 455, 461 (2011) (noting that business community in Indonesia has argued that CSR should be voluntary); *see also supra* note 68-71 and accompanying text.

[76] Loi 2016-138 du 11 février 2016 relative à la lutte contre le gaspillage alimentaire [Law 2016-138 of February 11, 2016 on the War Against Food Waste], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 12, 2016, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032036289&categorieLien=id (last visited Feb. 10, 2017).

[77] *See generally*, UNEP, CARROTS AND STICKS – PROMOTING TRANSPARENCY AND SUSTAINABILITY (2010), http://www.unep.fr/shared/publications/pdf/WEBx0161xPA- %20&%20Sticks%20II.pdf [hereinafter Carrots and Sticks].

Some have suggested that the very notion of CSR is intended to capture *private* conduct, leaving government to operate on a separate sphere to limit harmful corporate impacts on society through law and regulation.[78] This definition does not presuppose that compliance with the law is *not* a responsibility of companies; rather, it presumes legal compliance is a minimum standard for corporate behavior.[79] Still, this definition implies adherence to a shareholder primacy model of corporate conduct that eliminates any form of universal moral responsibility other than obeying the law, and simply gives corporations credit when they do take socially responsible actions.[80] It suggests, for example, that a corporation would have no ethical, moral, or social obligation to *refrain* from dumping hazardous waste into a community's water supply were such conduct not prohibited by law. Instead, the corporation's voluntary decision not to dump hazardous waste would be lauded as an example of CSR, potentially nurturing criticism of CSR as "greenwashing"[81] and leading to international inconsistency as exemplified by the French food waste law mentioned above.

The voluntary notion may actually serve to undermine CSR efforts, leaving them vulnerable to charges that they represent unnecessary costs to shareholders that should be eliminated to increase returns.[82] Take, for example, efforts by MNEs to improve conditions for workers or monitor factories for human rights abuses. Labeling these programs "CSR" creates the impression that they are voluntary corporate activities that could be eliminated if they prove not to increase profits, when in fact they may be essential to compliance with labor laws and basic human rights under international law.[83] Alternatively, this definition could be interpreted to suggest that

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[78] *See* Harper Ho, *supra* note 70, at 383. Dentchev notes the contradiction between the voluntary definition and presence of government regulation, and proposes a "contingency" theory of CSR that would recognize that different situations called for varying levels of government involvement. *See* Dentchev, *supra* note 68, at 379.

[79] *See* Li-Wen Lin, *Corporate Social Responsibility in China: Window Dressing or Structural Change?*, 28 BERKELEY J. INT'L L. 64, 64 (2010) ("[CSR]…suggests that companies should do more than they are obligated under applicable laws governing product safety, environmental protection, labor rights, human rights, community development, corruption, and so on").

[80] *See* Beate Sjafjell, *Regulating Companies as if the World Matters: Reflections from the Ongoing Sustainable Companies Project*, 47 WAKE FOREST L. REV. 113, 119, 120 (2012) (arguing "defining CSR through delimitation against legal obligations is deceptive and detrimental to the development of a sustainably and socially responsible business" and that it "promotes the shareholder primacy drive and the misconception that the company is and should be a vehicle for profit maximization").

[81] *See supra* note 19 and accompanying text.

[82] *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY 4 (2005) ("[P]recisely because CSR is voluntary and market-driven, companies will engage in CSR only to the extent that it makes business sense for them to do so . . . . In most cases, CSR only makes business sense if the costs of virtuous behavior remain modest," thus limiting "the improvements in corporate social and environmental performance that voluntary regulation can produce."). *See also* Benjamin C. Fishman, *Binding Corporations to Human Rights Norms Through Public Law Settlement*, 81 N.Y.U. L. REV. 1433, 1447 (2006) (suggesting that CSR, defined as voluntary actions that create value for corporations, is "highly problematic" because "its effectiveness depends entirely on the willingness of consumers and investors to change their behavior as a result of positive or negative publicity—in other words, CSR will function only insofar as there is a 'business case' for it.")

[83] *See* Cheryl Marihugh, *Only Strong Laws Can Compel Corporations to Protect Human Rights*, in CORPORATE SOCIAL RESPONSIBILITY 116–23 (Susan Hunnicutt, ed. 2009). Marihugh makes the argument that placing responsibility for monitoring factory conditions under the heading of CSR "dilutes the incentives for companies to improve conditions" because it positions them as "optional" as opposed to legally mandated. *Id.* at 118. She suggests many factories and contractors within the supply chains of multinational corporations violate basic labor laws, and that the label of CSR may be to blame for a failure to engage in compliance activities. *Id.* at 118–19. Note the legal differences between the United States and European countries in holding corporations accountable for human rights

programs that are required by law, such as mandatory reporting requirements described in Part II, are not part of the social responsibility of the corporation, potentially encouraging the company to avoid compliance except as strictly required by law.

Finally, the "voluntary" label steps directly into the question of whether CSR is synonymous with charity, or at least includes charitable activities. While many consider charity to be a legitimate CSR activity, others strongly reject the conflation of the two concepts.[84] Those who reject the notion suggest that characterizing charity as CSR allows the corporation to distract from its operations, leading to greenwashing.[85]

C. CSR as an Explicit Moral, Ethical, or Social Duty

In contrast to these attempts to minimize or even remove the ethical component of CSR, a few examples can be found of CSR directly defined in law and policy as a normative, ethical duty. China has explicitly incorporated a direct normative expectation of social responsibility into its laws. In 2005, then President Hu Jintao proclaimed a government mandate to "strengthen CSR," and Article 5 of the 2006 revision to China's Company law provides that companies must "undertake social responsibility."[86] This charge was intended to buttress and strengthen the 1994 Company Law, which provided that companies were required to "conform to business ethics…and subject themselves to the government and public supervision in the course of business."[87]

It is important to note that for companies listed on the Chinese stock exchange, this explicit ethical duty appears to be combined with a form of shareholder primacy. A separate code provides: "[w]hile…*maximizing the benefits of shareholders*, the company shall be concerned with the welfare, environmental protection, and public interest of the community in which it resides, and shall pay attention to the company's social responsibilities."[88] Thus it appears that within China, both shareholder primacy and a social and moral expectation of CSR exist simultaneously for listed companies.[89] This complex relationship with CSR may be partly explained by the fact that the

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violations after the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), *see generally* Caroline Kaeb & David Scheffer, *The Paradox of Kiobel in Europe*, 107 AM. J. INT'L L. 852 (2013).

[84] Carroll's four-part definition of CSR includes a "philanthropic" component. Carroll, *supra* note 15, at 289; Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: toward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39, 41 (July/Aug. 1991) ("it is important that managers and employees participate in voluntary and charitable activities within their local communities"). On the other hand, the ISO 26000 standards, which include CSR, do not include a charitable component. *See* Qinghua Zhu & Qiangzhong Zhang, *Evaluating Practices and Drivers of Corporate Social Responsibility: The Chinese Context*, 100 J. CLEANER PRODUCTION 315, 317 (2015) (noting that charity is nonetheless an important part of CSR in China). *See also* Colin Marks & Paul S. Miller, *Plato, The Prince, and Corporate Virtue: Philosophical Approaches to Corporate Social Responsibility*, 45 U.S.F. L. REV. 1, 9 (2010) (describing dispute among legal scholars).

[85] *See* Sjafjell, *supra* note 80, at 126. Professor Sjafjell suggests that CSR, unlike corporate charity work, must be fully integrated into the operations of the company. *Id.* at 119–21.

[86] *See* Lin, *supra* note 79, at 65; *see also* Harper Ho, *supra* note 70, at 399 (translating as "bear social responsibilities").

[87] Lin, *supra* note 79, at 69.

[88] Ying Chen, *Corporate Social Responsibility from the Chinese Perspective*, IND. INT'L & COM. L. REV. 419, 422–23 (2011) (emphasis added; citing Article 86 of the Code of Corporate Governance for Listed Companies in China, originally promulgated in 2001).

[89] For a discussion of this uniquely Chinese theory of CSR, which mediates between shareholder primacy and a sort of stakeholder theory, see Min Zhang and Xiaoyu Liang, *Doing Well by Doing Good? A New Normative Perspective on Corporate Social Responsibility: Advances Among Debates: Research on and Practice of Corporate Social Responsibility from the Legal Perspective in China*, 25 FORDHAM ENVTL. L. REV. 191, 202–10, 208 (2013) (finding

concept of CSR was imported into China, at least in part, by western MNEs in the 1990s, and the government has struggled since then to develop the notion in a manner that promotes Chinese ideology while also encouraging free-market ideals.[90] Studies suggest Chinese businesspeople associate CSR with philanthropy or internationally-imposed norms, rather than social or moral duties to communities to address the direct impacts of corporate activities.[91]

In India, a 2009 set of voluntary guidelines on CSR, published by the Ministry of Corporate Affairs, resemble a form of stakeholder theory, stating that each company should have a CSR policy, and it should include "care for all stakeholders" as one of its key elements.[92] The updated 2011 guidelines "urge businesses to embrace the 'triple bottom-line' approach" and offer a series of principles to guide responsible company behavior, including the principle that "businesses should conduct and govern themselves with Ethics, Transparency, and Accountability."[93]

Notably, in 2013, India went beyond these voluntary guidelines to adopt a mandatory charity policy, in which companies having a certain net worth are required to have a "Corporate Social Responsibility Policy,"[94] and to contribute at least 2% of average net profits to causes in furtherance of that policy.[95] The 2013 Company Law does not provide an updated definition of CSR, but the terms of the mandatory giving policy demonstrate that India's conception of CSR is now explicitly rooted in a moral duty to give back to the community to address social problems, including extreme hunger, a need for education, child mortality, and environmental sustainability,

a variety of theories and noting "some scholars are seriously reflecting on the nature of a company and the relationship among the CSR stakeholder and shareholder primacy theories, raising differing opinions in the matter").

[90] *See* Afsharipour & Rana, *supra* note 75, at 197–205 (providing history of CSR initiatives and policy in China from 1990s to present).

[91] *Id.* at 205–06. Interestingly, a recent study of CSR practices at state-owned companies in China indicated that Chinese companies engaged in minimal charity and community engagement activities, particularly in comparison with activities related to employee rights, consumer issues, fair operating practices, and labor practices. Zhu & Zhang, *supra* note 84 at 320–21(2015). According to researchers, this may be because the concept of "community" is less developed in China, and because charitable donations are more likely to be seen as political activity, and because state-owned companies may not have the authority to engage in charitable donations at the local level. *Id.* at 321.

[92] MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, CORPORATE SOCIAL RESPONSIBILITY VOLUNTARY GUIDELINES 2009 (hereinafter "2009 CSR GUIDELINES"), http://www.mca.gov.in/Ministry/latestnews/CSR_Voluntary_Guidelines_24dec2009.pdf.

[93] *See* MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, NATIONAL VOLUNTARY GUIDELINES ON SOCIAL, ENVIRONMENTAL & ECONOMIC RESPONSIBILITIES OF BUSINESS 6, 7 (2011) (hereinafter "2011 GUIDELINES"), http://www.mca.gov.in/Ministry/latestnews/National_Voluntary_Guidelines_2011_12jul2011.pdf.

[94] Companies Act of 2013, No. 18 of 2013, INDIA CODE, at 87, sec. 135, http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf. In 2011, the expanded set of Voluntary Guidelines explicitly moved away from using the term "corporate social responsibility" to using the term "responsible business," with the intent that the latter term "encompasses the limited scope and understanding of the term CSR." 2011 GUIDELINES, *supra* note 93, at 4. However, the government returned to using the term corporate social responsibility in the Companies Act of 2013.

[95] Arjya B. Majumdar, *India's Journey with Corporate Social Responsibility—What's Next?*, 33 J. L. & COM. 165, 188–91 (Spring 2015) (describing initial passage of the requirement under Section 135 of the Companies Act of 2013, and subsequent clarification).

among others.[96] Whether intentional or not, the CSR requirement has led many to characterize CSR in India as being limited to "charity."[97]

A normative ethical definition of CSR can also be found in international voluntary corporate social responsibility codes, including the United Nations (U.N.) Global Compact ("Global Compact").[98] The Global Compact provides companies with ten principles to guide their business activities in a socially responsible manner, as well as a set of sustainable development goals to eliminate extreme poverty while protecting the environment.[99] The Ten Principles, which include the protection of human rights, elimination of discrimination, and initiatives to promote greater environmental responsibility,[100] are drawn from other international codes, including the U.N. Universal Declaration of Human Rights[101] and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines").[102] The Global Compact is based in part on businesses' "basic responsibilities to people and planet,"[103] while the OECD Guidelines state that MNEs should "consider the views of other stakeholders" while they "contribute to economic, environmental and social progress with a view to achieving sustainable development."[104]

II. Legalization of CSR: The Enabling of Shareholder Primacy?

This Part gives an overview of different forms of CSR regulation currently in place at corporate, industry, national, as well as international levels, and how new regulations have contributed to the "hardening of CSR."[105] It investigates whether there is evidence for a growing trend towards regulating or otherwise enforcing CSR, and whether this is a global, or rather national or regional trend. It also considers how the hardening that has occurred has allowed

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[96] *See* Juhn Karhu, *Corporate Social Responsibility and the Law: Ideas for Developing Dynamic Elements of Mandatory CSR*, 7 REV. MARKET INTEGRATION 62, 64–65 (2015) (listing activities permitted under Company Law for CSR contributions); *see also* General Circular No. 01/2016, FAQs with regard to Corporate Social Responsibility under section 135 of the Companies Act, 2013, https://www.mca.gov.in/Ministry/pdf/FAQ_CSR.pdf (explaining the types of contributions permitted under Company Law); *see also* Sandeep Gopalan & Akshaya Kamalnath, *Mandatory Corporate Social Responsibility as a Vehicle for Reducing Inequality: An Indian Solution for Piketty and the Millennials*, 10 NW. J. L. & SOC. POL'Y 34, 64 (2015) (quoting Standing Committee, which reviewed the 2011 version of the mandatory CSR provision as stating, "'[Corporations] owe it to the people and the society to pay them back in terms of social services and by building social capital for the common good.'").

[97] Ashutosh Verma & C.V.R.S. Vijaya Kumar, *An Analysis of CSR Expenditure by Indian Companies*, 7 INDIAN J. CORP. GOV. 82, 84 (2014). *See also* Gopalan & Kamalnatah, *supra* note 96, at 81 (concluding from a review of 50 companies' official CSR webpages that a majority see CSR as "a philanthropic exercise" rather than an obligation to all stakeholders or a tool for reputation enhancement).

[98] U.N. GLOBAL COMPACT, https://www.unglobalcompact.org/ (last visited Feb. 15, 2017).

[99] U.N. GLOBAL COMPACT, THE SDGS EXPLAINED FOR BUSINESS, https://www.unglobalcompact.org/sdgs/about (last visited Feb. 15, 2017).

[100] U.N. GLOBAL COMPACT, THE TEN PRINCIPLES OF THE UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles (last visited Feb. 15, 2017).

[101] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), http://www.un.org/en/universal-declaration-human-rights/ (last visited Feb. 15, 2017).

[102] OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2011, http://www.oecd.org/daf/inv/mne/48004323.pdf.

[103] U.N. GLOBAL COMPACT, *supra* note 98.

[104] OECD, *supra* note 102, at 19.

[105] *See supra* note 10.

corporations to continue to sidestep normative conclusions about the ethical responsibility of corporations in society.[106]

A. Private CSR Regulation

We label the first category of CSR regulation "private regulation." These are sets of rules to which firms voluntarily submit. These types of regulation have long been the privileged form of CSR regulation, at least in part because CSR has often been described in terms of voluntary actions by corporations.[107] A rich literature comments on the nature of self-regulation generally,[108] as well as the advantages and limitations of its use for CSR, which are beyond the scope of this paper.[109] Here the focus is on the degree of control or "hardening" these instruments imply.[110] In the following we distinguish between individual and industry self-regulation and analyze government involvement with, and enforcement of each on the national and international level as a proxy for their legalization.[111]

1. Individual Self-Regulation

Typical forms of individual self-regulation with respect to CSR principles are internal rules and policies that companies develop on a voluntary and independent basis[112] such as internal CSR

[106] Beyond the scope of this survey are international treaties, though some of them arguably have an indirect effect on business as far as they create a duty for signatory States to "protect against infringement from private actors." Joe W. (Chip) Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL'Y 334, 352–53 (2009) (referencing examples). We also exclude from our analysis certain soft law instruments as far as they do not contribute to the "hardening" of CSR. *See* Stephen Kim Park & Gerlinde Berger-Walliser, *A Firm-Driven Approach to Global Governance and Sustainability*, 52 AM. BUS. L.J. 255, 280–82 (2015) (distinguishing soft law and self-regulation as private rulemaking).

[107] *See supra* Part I.B.

[108] *See, e.g.*, Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 L. & POL'Y (1997) 363, 364–66 (defining and distinguishing various forms of self-regulation); Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665, 674–77 (2010) (describing multiple typologies of self-regulation); *see generally* Julia Black, *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World,* 54 CURRENT LEGAL PROBS. 103 (2001); Tracy M. Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL'Y F. 67 (2012).

[109] *See generally* Joel Bakan, *The Invisible Hand of Law: Private Regulation and the Rule of Law*, 48 CORNELL INT'L L.J. 279 (2015); Veronica Besmer, *The Legal Character of Private Codes of Conduct: More than Just a Pseudo-Formal Gloss on Corporate Social Responsibility*, 2 HASTINGS BUS. L.J. 279 (2006); David Vogel, *The Private Regulation of Global Corporate Conduct Achievements and Limitations*, 49 BUS. & SOC'Y 68 (2010); Krista Bondy et al., *Multinational Corporation Codes of Conduct: Governance Tools for Corporate Social Responsibility*, 16 CORP. GOVERNANCE 294 (2008).

[110] *See* Shaffer & Pollack, *supra* note 10, at 743–48 (showing how the antagonistic interaction between soft and hard law can lead to the "hardening of soft-law regimes").

[111] The differentiation was inspired by Gunningham & Rees, *supra* note 108, at 364 (distinguishing between individual self-regulation and self-regulation by groups).

[112] *See* Gunningham & Rees, *supra* note 108, at 364 (characterizing individual self-regulation as "the normative orders of private governments" where "an entity regulates itself, independent of others"). Some overlap between this and other categories of self-regulation discussed below exist; e.g. some corporate codes of conduct are part of industry self-regulation, or are designed after a model code issued by industry and/or social society associations, such as the Ethical Trading Initiative or the Fair Labor Organization Workplace Code of Conduct; *see* OECD, *Overview of Selected Initiatives and Instruments Relevant to Corporate Social Responsibility*, in ANNUAL REPORT ON THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 2008: EMPLOYMENT AND INDUSTRIAL RELATIONS

policies and management structures,[113] as well as codes of conduct and standards or principles for their conduct in the marketplace.[114]

Self-driven and without independent control, these private policies may seem at the very outer spectrum of CSR regulation seemingly baring government or other outside involvement.[115] Because of the lack of control they are often criticized as ineffective and nothing more than marketing tools.[116] Empirical research suggests that corporate codes of conduct are not primarily used as CSR governance tools but are used by firms to manage other issues such as compliance.[117] Enforcement - if any - typically comes from social or economic pressure, especially out of concern for a company's reputation or the value of its brand.[118]

In some cases however, the economic pressure, indirectly, is motivated by government action. In the U.K., Germany, or France, for example, legislation directed towards pension funds obliges these to disclose the extent to which CSR criteria are taken into consideration in the selection, retention, and liquidation of fund investments. This legislation in turn motivates corporations to voluntarily disclose their CSR activities or to submit to related codes of conduct in order to be eligible for these institutional investments.[119] While this type of regulation by incentives does not mandate CSR, it rewards and thereby encourages CSR and insofar indirectly contributes to the legalization of CSR.[120]

Enforcement of individual self-regulation can also take a much "harder," that is entirely legal form as the famous case of *Kasky v. Nike*, where the non-respect of a code of conduct was considered false advertising to consumers, illustrates.[121] In France, consumer law allows for collective action by consumer associations to defend consumers' rights[122] and an EU

246 (2009), http://www.keepeek.com/Digital-Asset-Management/oecd/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2008/overview-of-selected-initiatives-and-instruments-relevant-to-corporate-social-responsibility_mne-2008-8-en#page1 (providing numerous examples for model code of conducts).

[113] *See* Roberts, *supra* note 108, at 87.

[114] *See* OECD, CODES OF CORPORATE CONDUCT: EXPANDED REVIEW OF THEIR CONTENTS 3 (Working Paper on International Investment No. 2001/6, May 2001), https://www.oecd.org/daf/inv/investment-policy/WP-2001_6.pdf.

[115] *See* Jean-Pascal Gond et al., *The Government of Self-regulation: on the Comparative Dynamics of Corporate Social Responsibility*, 40 ECON. & SOC'Y 640, 647 (2011) (distinguishing five "CSR-government configurations").

[116] Besmer, *supra* note 109, at 301–03 (arguing that "[u]nlike attorneys or doctors who face personal expulsion from professional associations when they do not live up to professional standards, public disgrace hardly deters MNEs from an occasional over-step when profits are on the line" and therefore require authoritative oversight).

[117] Bondy et al., *supra* note 109, at 295 (pointing towards the example of internal employee guidelines to avoid bribery).

[118] Besmer, *supra* note 109, at 303–06; *see also* Elisa Westfield, *Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century*, 42 VA. J. INT'L L. 1075, 1100–01 (2002) and Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law* 7–11 (University of Edinburgh School of Law, Working Paper Series (03/2009)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1369305 (discussing the interrelationship between branding and CSR).

[119] *See* André Sobczak, *Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law*, 16 BUS. ETHICS QUARTERLY 167, 168 (2006) (with references).

[120] *See generally* Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531 (2002).

[121] *See* Sobczak, *supra* note 119, at 168 (referencing Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002)); Nike, Inc. v. Kasky, 539 U.S. 654 (2003); *see* also Katerina Peterkova Mitkidis, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements*, NORDIC J. COMM. L. 1, 18 (2014), http://njcl.utu.fi/1_2014/mitkidis_katerina_peterkova.pdf (referencing a German court case against German retailer Lidl over its Clean Clothes Campaign).

[122] Sobczak, *supra* note 119, at 174 (citing DIDIER FERRIER, LA PROTECTION DES CONSOMMATEURS 71 (1996)).

recommendation from 2013 encourages EU Member States to introduce consumer collective redress mechanisms into the domestic law of its Member States, potentially suitable to strengthen legal action against misleading corporate codes based on consumer law.[123] It should be noted that this type of legal remedy against the violation of corporate codes of conduct is not the primary objective of the EU regulation and that the use of consumer law for the legalization of CSR has been criticized as inappropriate.[124] Nevertheless, and for the lack of more specific judicial remedies, consumer law has proven effective in enforcing corporate codes of conduct and insofar contributes to the hardening of CSR.

In order to manage and mitigate legal and reputational risks stemming from their suppliers' behavior, companies increasingly incorporate codes of conduct in their (mostly international) supply chain contracts.[125] By doing so MNEs try to impose certain social or environmental standards, which they either consider important or by which they will be judged in their home States, independent from the legal or social norms in place in the supplier's jurisdiction.[126] If drafted carefully, SCCs could become part of the supply contract in the same way any other unilaterally drafted contract terms such as general sales or purchasing conditions become binding upon contract partners.[127] This prospect at legal enforceability, in addition to social and economic pressure,[128] contributes significantly to the hardening of this form of individual CSR self-regulation.[129]

Whether the growing reliance on codes of conduct or SCCs translates to an increasing corporate concern about social or environmental conditions or is rather motivated by fear of reputational damage or legal risk management is an open question further discussed in Part III.

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[123] Commission Recommendation 2013/396/EU of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 2013 O.J. (L 201/60), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013H0396#ntc3-L_2013201EN.01006001-E0003.

[124] *See* Sobczak, *supra* note 119, at 176 (calling workers' protection through consumer protection laws "strange, if not cynical" and discussing potential conflicts of interest).

[125] *See* Mitkidis, *supra* note 121, at 5 (referring to this type of contract terms as sustainability contractual clauses (SCCs) and defining them as "provisions in business contracts that cover social and environmental issues which are not directly connected to the subject matter of the specific contract"). Sometimes companies will not act in isolation, but join with other firm from the same industry or stakeholders to create standards or codes, insofar there can be some overlap with industry self-regulation discussed in the following section.

[126] On how MNEs should adapt to different ethical values in foreign countries, *see generally* Thomas Donaldson, *Values in Tension: Ethics Away from Home*, 74 Harv. Bus. Rev. 48 (1996); *see also* Fabrizio Cafaggi, *Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'*, 23 EUROP. J. INT'L L. 695, 711–15 (2012) (on the use of private contracting for the protection of global public goods).

[127] *See* Mitkidis, *supra* note 121, at 12–15 (discussing the prerequisites for valid inclusion of SCCs into a commercial contract) and at 21 (suggesting that MNEs are usually more interested in the management and relational function that SCCs entail rather than their legal enforceability).

[128] *See id.* at 21 (stating that "[a]n increasing number of CSR initiatives establish a database of compliant suppliers. [citation omitted]. A supplier, who is erased from such a database or, worse still, listed as non-compliant can no longer be used by members of the specific initiative").

[129] *See id*. at 24 (concluding that "[a] major contribution of formal contract law lies in the legalization of CSR, which was traditionally perceived as an area of voluntary action"). The liability of a German discount clothing retailer for the death of its suppliers' employees in a deadly factory fire in Karachi (Pakistan) has been invoked in a case currently pending before a German court. The complaint among others is based on the buyer's allegedly insufficient enforcement of its SCCs on which the supply contract was based. *See* Rolf H. Weber & Rainer Baisch, *Liability of Parent Companies for Human Rights Violations of Subsidiaries*, 27 EUR. BUS. L. REV. 669, 669 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625536.

2. Industry Self-Regulation

Because industry standards are often less precise than individual self-regulation, they are less likely to be legally enforceable.[130] However, some argue that "because of the substantive nature of their norms (which address social and environmental externalities) and the importance of monitoring and enforcement," industry standards are "regulatory standard-setting" schemes and insofar a "new form of transnational 'regulation'".[131] A wide range of external actors, such as NGOs, IGOs, and commercial inspection and auditing firms, monitor industry standards and insofar contribute to their hardening.[132] Enforcement does not take place through traditional judicial channels but through social or market pressure from stakeholders such as customers, suppliers, shareholders, or employees.[133]

In their seminal work on self-regulation, Abbott and Snidal claim that the most powerful and legitimate private regulators are collaborative schemes, where different actors complement each other's competencies.[134] While their empirical data suggested that these collaborative schemes are underrepresented compared to single actor schemes,[135] recent years have shown a significant growth in public-private partnerships and multi-stakeholder collaboration.[136] Particularly interesting for the purpose of this Article are collaborative schemes in which the government plays an important role, such as the Global Compact.[137] These private–public partnerships and other "hybrid approaches"[138] to CSR regulation (*e.g.*, government monitored voluntary disclosure)[139] blur the lines between public and private regulation. Their growing use may be interpreted as another sign for the increasing legalization of CSR.

3. Certification and Labeling

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[130] *See* Tim Baines, *Integration of Corporate Social Responsibility through International Voluntary Initiatives*, 16 IND. J. GLOBAL LEGAL STUD. 223, 226 (analyzing the example of the Equator Principles, a self-governing standard set and adopted by over sixty banks and financial institutions members of the Equator Principles Financial Institutions); *see also* Gunningham & Rees, *supra* note 108, at 378 (noting that industry self-regulation typically is limited to frameworks, which leave it to the individual member firms to develop their own detailed policies and procedures).

[131] Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and The Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44, 44 (Walter Mattli & Ngaire Woods eds., 2009) (applying their framework not only to industry standards but all types of self-regulation).

[132] *Id.* at 67 (stressing the importance of expertise and independence these monitoring organizations need to demonstrate to be credible).

[133] *Id.* (arguing that because the information often is not readily available to the actors who potentially could enforce the standards – customers or other actors on the markets - and these are 'diffuse' groups, they need to be 'activated' to perform sanctions).

[134] *Id.* at 72–73 (observing that when comparing different forms of self-regulations these collaborative schemes are significantly fewer than single actor schemes).

[135] *Id.*

[136] *See generally* Carrots and Sticks, *supra* note 77.

[137] *See supra* note 98-103 and accompanying text.

[138] *See also* Roberts, *supra* note 108, at 74 (2012) (mentioning voluntary programs or negotiated agreements offered by government as hybrid forms of regulation).

[139] *E.g.*, the German Sustainability Code [hereinafter GSC]: a voluntary reporting regime drafted through collaboration between stakeholders and closely monitored by the German government, *see* Park & Berger-Walliser, *supra* note 106 at 293 (describing the origin and nature of the code).

Certification and labeling schemes aim to provide buyers (individuals as well as businesses) with what is deemed to be easily accessible and reliable information in order to enable them to make informed purchasing decisions.[140] Typical examples of such initiatives are the "fair trade" label, the International Organization for Standardization (ISO) 14001 environmental standards,[141] or the Fair Labor Association (FLA) and Social Accountability International's (SAI) SA 8000 labor standards.[142] Maybe the most prolific and encompassing certification scheme today, the U.N. Global Compact, aims at promoting best practices between businesses that advance societal goals, especially in the area of human rights, labor, environment and anti-corruption.[143] In addition to their informative character some of the existing, more elaborate, certification schemes, such as the European Commission's Eco-Management and Audit Scheme (EMAS) are intended to help companies set up socially responsible management systems.[144]

While companies submit to these norms voluntarily, unlike standards developed by industry associations or corporate codes of conduct, firms do not directly participate in their drafting.[145] Their origin ranges from standards developed by Non Governmental Organizations (NGOs) (such as Amnesty International Human Rights Principles for Companies), to private schemes (such as ISO),[146] to labels or schemes developed by local or international government (food labels, EMAS)[147] or International Governmental Organizations (IGOs) (U.N. Global Compact). Some labels may be legally enforceable by government agencies or domestic courts, such as specifically regulated labels (*e.g.*, organic food labels or the CE marking for medical

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[140] OECD, *supra* note 112, at 238 (defining certification and labeling).

[141] While other ISO standards lead to certification, ISO 26000 is only intended to provide guidance and to "help[] clarify what social responsibility is." INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, ISO 26000-SOCIAL RESPONSIBILITY, http://www.iso.org/iso/home/standards/iso26000.htm (last visited March 8, 2017). While ISO 26000 covers CSR as such, unlike other ISO standards it provides guidance, but cannot be certified to. ISO, STANDARDS, ISO 26000 - SOCIAL RESPONSIBILITY, http://www.iso.org/iso/home/standards/iso26000.htm (last visited Feb. 15, 2017). The entirety of the ISO 26000 standard lies behind a paywall, but in this code the term "social responsibility" is generally defined as "ethical and transparent behavior" that contributes to sustainable development, takes into account the interests of stakeholders, complies with legal standards, and is integrated throughout the organization. *See* AMERICAN SOCIETY FOR QUALITY, WHAT IS SOCIAL RESPONSIBILITY?, http://asq.org/learn-about-quality/social-responsibility/ (last visited March 8, 2017). Social responsibility is also said to include the notion of the "triple bottom line," in which the corporation seeks to obtain profits while also positively impacting people and the environment. *Id.*

[142] *See* OECD *supra* note 112, at 246 (providing multiple examples).

[143] *See* U.N. GLOBAL COMPACT, OUR MISSION, https://www.unglobalcompact.org/what-is-gc/mission (last visited Mar. 7, 2017). ("We provide a principle-based framework, best practices, resources and networking events that have revolutionized how companies do business responsibly and keep commitments to society. By catalyzing action, partnerships and collaboration, we make transforming the world possible – and achievable – for organizations large and small, anywhere around the globe.").

[144] European Commission, *How does it work?*, ENVIRONMENT ECO-MANAGEMENT AND AUDIT SCHEME, http://ec.europa.eu/environment/emas/join_emas/how_does_it_work_step0_en.htm.

[145] Except for a few labels which are mandatory, such as CE marking for medical devices in the EU.

[146] *See* David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENVTL. AFF. L. REV. 79, 80 (noting that ISO is not an intergovernmental organization, but an association of standardizing bodies, which in some countries are privately organized, such as the American National Standards Institute, while they are government agencies in others); *see supra* note 141.

[147] *See* Sevine Ercmann, *Enforcement of Environmental Law in United States and European Law: Realities and Expectations*, 26 ENVTL. L. 1213 (1996) (describing EMAS as a scheme that "establishes and implements environmental policies, programs, and management systems for companies . . . . provides for the "systematic, objective and periodic evaluation" of these elements [and f]inally . . . requires public disclosure of environmental performance" [citations omitted]).

devices in the EU).[148] Other than that, enforcement takes place mainly through social or market pressure.[149] One could argue that the more objective or stringent the associated auditing system, the "harder" the nature of this type of private CSR regulation.

Similar to some corporate codes, firms' unfaithful use of labels has been challenged under false advertising laws, as evidenced by a recent FTC action against companies allegedly falsely promoting cosmetic products as "all natural,"[150] as well as a growing number of civil lawsuits against companies promoting food as "all natural" despite the presence of synthetic ingredients.[151] The discussion around the legal enforceability of labels is relatively new to the U.S. legal community, but some European countries have a developed jurisprudence supporting legal action against unfaithful use of labels under unfair competition laws.[152] As well intentioned as these judicial attempts to strengthen CSR through the use of unfair competition law might be, they also present an inherent danger to cloud the nature of CSR, which is further discussed in Part III. Legal action against companies for misappropriating CSR related labels based on false advertising laws may punish or prevent them from lying to consumers, but says nothing about a firm's moral obligation to sell natural food, build energy efficient houses, refrain from using child labor, or the like.

B. Public CSR Regulation

As described earlier,[153] defining CSR as "voluntary" corporate actions is problematic. We do not, therefore believe it is a contradiction to suggest that government mandated policies and regulations, and corporate activities in response thereto, could constitute CSR. This Part surveys the growing use of public CSR regulation and provides examples for such laws and their contribution to the hardening of CSR from different regions of the world.

1. Disclosure Laws

Most activity demonstrating the use of public CSR regulation can be seen in the growth of mandatory disclosure laws, which can be found in almost every region, including the United States, EU, and developing nations.

In the United States, annual and quarterly disclosure requirements contained in the Securities Act of 1993 and the Securities Exchange Act of 1934 represent a key method of mandating new and enhanced corporate disclosures for externalities and corporate activities impacting stakeholders. While these corporate disclosure statutes, as modified under the Sarbanes-Oxley Act of 2002, do not directly require that a corporation report its negative externalities,

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[148] Council Directive 93/42/EEC, 1993 O.J. (L 169).

[149] *See* Roberts, *supra* note 108, at 84–85 (describing how "[t]hese regimes use the supply chain to create financial incentives for performance").

[150] Serena Ng, *FTC Charges Five 'Natural' Products Firms Over Claims,* WALL STREET. J. (Apr. 13, 2016, 2:57 PM), http://www.wsj.com/articles/ftc-charges-five-natural-products-firms-over-claims-1460500050.

[151] *See* Alexa S.Z. Austin, *Ninth Circuit Reverses Summary Judgment in "All Natural Fruit" Case, Upholds Denial of Class Certification*, FOOD LITIGATIONS NEWS (Oct. 3, 2016), https://www.foodlitigationnews.com/2016/10/ninth-circuit-reverses-summary-judgment-in-all-natural-fruit-case-upholds-denial-of-class-certification/ (last visited Mar. 7, 2017).

[152] *See e.g.*, Stefan Weidert, *In "Bio" We Trust: Werbung mit Genehmigungen, Gütesiegeln und Anderen Qualitätskennzeichen*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT (GRUR-PRAX.) 315 (2010) (Ger.).

[153] *See supra* Part I.B.

specific provisions do require reporting of environmental costs, judicial proceedings, environmental trends and events, and environmental events that would make investment in the securities risky.[154]

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act includes a provision requiring disclosure of the use of "conflict minerals" in products manufactured by covered entities.[155] The term "conflict minerals" refers to four minerals (tin, tantalum, tungsten, and gold) the sale of which has been used to fuel horrific violence in the Democratic Republic of Congo (DRC).[156] This unique statute, which was intended to address a singular humanitarian crisis in the DRC, has been criticized for seeking to use disclosure rules to address a diplomatic crisis, imposing undue compliance costs on small businesses, and creating an almost impossible task for companies that may be unable to fully trace the origin of the minerals used in their products.[157] Despite the criticism and limited success of the U.S. conflict minerals regulation,[158] the EU is following the United States example and is in the process of passing similar regulation on the EU level.[159]

On the state level, California's 2010 Transparency in Supply Chains Act requires manufacturers and retailers to disclose the extent to which they monitor their supply chains for potential human rights abuses, particularly efforts to eliminate slavery and human trafficking.[160] Some have argued that the shareholders' right of inspection under Delaware law can be used to investigate corporate impacts on communities and stakeholders, though that right has been somewhat narrowly construed to be limited to investigations of corporate mismanagement.[161]

A variety of countries have imposed mandatory non-financial disclosure requirements on companies listed on stock exchanges.[162] For example, the King IV Report on Global Governance for South Africa 2016 ("King IV")[163] asserts that organizations take their legitimacy from society as a whole, and as a result must consider "what impact they are having on critical aspects of society

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[154] Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 663–66 (2013). Relevant regulations include Regulation S-K, Items 101, 103, 303, 503, and the SEC's recent interpretive release on climate change. *Id.* For an analysis of the SEC's climate change disclosure requirements, *see* Marc L. Miller & Jonathan T. Overpeck, *Climate Change and the Practice of Law*, 47 ARIZ. ATT'Y 30 (Oct. 2010).

[155] 15 U.S.C. § 78m(p) (2012); Karen E. Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1316 (2012); Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Social Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, (2015) (page numbers not available).

[156] Woody, *supra* note 155, at 1316.

[157] *Id.* at 1319, 1334–35.

[158] The regulation has also been criticized for its unintended consequences, i.e., in an effort to avoid reporting obligations companies simply refrain from sourcing in the listed countries thereby hurting their already fragile economies, *see id.* at 1346 (arguing that the reporting requirements are likely to lead to a "de facto embargo").

[159] Council, Proposal for a Regulation of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict- affected and high-risk areas, 2014/0059 (COD), http://data.consilium.europa.eu/doc/document/ST-15115-2016-INIT/en/pdf.

[160] Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 WASH. L. REV. 747, 752 (2014); Johnson Jr., *supra* note 44. A similar statute has been proposed at the federal level, though it would be broader. *Id.*

[161] Gabrielle Palmer, *Stockholder Inspection Rights and an "Incredible" Basis: Seeking Disclosure Related to Corporate Social Responsibility*, 92 DENV. U. L. REV. ONLINE 125, 126, 140 (2015)

[162] Narine, *supra* note 155.

[163] INST. OF DIRECTORS IN SOUTHERN AFRICA, KING IV: REPORT ON CORPORATE GOVERNANCE FOR SOUTH AFRICA 4 (2016) (hereinafter "KING IV"), https://c.ymcdn.com/sites/iodsa.site-ym.com/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf.

and the environment" as well as how their decisions impact material stakeholders.[164] King IV makes specific recommendations for corporate governance based on this broad perspective, and requires integrated reporting of financial and non-financial information.[165] Although King IV is a voluntary code of corporate governance, because it has been adopted as a "comply or explain" requirement for companies that are listed on the Johannesburg Stock Exchange (JSE), it has become a *de facto* regulatory requirement for those companies.[166]

Across Europe, there are a variety of legal requirements established by EU and individual member states. The recent EU directive on non-financial disclosure requires companies incorporated in Member States "to disclose in their management report relevant and material information on policies, outcomes and risks, including due diligence that they implement, and relevant non-financial key performance indicators concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues, and diversity on the boards of directors."[167] Individual Member States, including the U.K., Sweden, Denmark, France, and Spain all have their own non-financial disclosure policies as well, which include mandatory reporting on CSR policies, greenhouse gas emissions, and human rights policies and programs.[168]

2. Mandatory Substantive Obligations

Laws that specifically identify actions or obligations as CSR, and that include substantive obligations other than disclosure, are few and far between. Notably, in February 2017, the French legislature passed a new law that obliges French companies with 5,000 or more employees to monitor subsidiaries and suppliers to prevent grave violations of human rights, basic liberties, health, safety, and environmental risk.[169] This law, which goes beyond disclosure to a substantive monitoring obligation, may represent a significant shift in policy to make companies more directly responsible for the activities of their suppliers.

In Indonesia, the 2007 Company Law first required natural resource companies to engage in CSR.[170] Regulation 47 of 2012 expanded on these obligations, mandating that natural resource companies engage in community development, environmental management, and stating they "bear a social and environmental responsibility which is harmonious and balanced with the surroundings

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[164] *Id.*, at 6.

[165] *See id.*; *see also* Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 VA. J. INT'L L. 97, 105 (2013).

[166] Barry Ackers & Neil Stuart Eccles, *Mandatory Corporate Social Responsibility Assurance Practices: The case of King III in South Africa*, 28 ACCOUNTING, AUDITING & ACCOUNTABILITY J. 515, 517 (2015) (explaining that King III asserts that companies should be judged not simply on financial performance, but also on "the value, or cost of company operations in the broader economy, the environment and society).

[167] European Commission Memorandum, Disclosure of Non-Financial and Diversity Information by Large Companies and Groups--Frequently Asked Questions (Apr. 5, 2014), http://europa.eu/rapid/press-release_MEMO-14-301_en.htm.

[168] *Id.*

[169] Assemblée Nationale, Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Feb. 21, 2017, http://www.assemblee-nationale.fr/14/ta/ta0924.asp (Fr.); *see also* EC Newsdesk, *Weekly Watch: 23 February 2017,* ETHICAL CORP. (Feb. 22, 2017), http://www.ethicalcorp.com/weekly-watch-23-february-2017?platform=hootsuite.

[170] Petra Mahy, *The Evolution of Company Law in Indonesia: An Exploration of Legal Innovation and Stagnation*, 61 AM. J. COMP. L. 377, 416 (2013); *see also* Sabela Gayo & Asmah Laili Yeon, *Mandatory CSR Law in Indonesia: New Emerging Policy* 1 (Nov. 2013) (suggesting that mandatory CSR is necessary in the societies where otherwise corporations would not comply with voluntary provisions), https://www.researchgate.net/publication/258567475_Mandatory_CSR_Law_in_Indonesia_New_Emerging_Policy.

and the local society."[171] However, the law has been criticized for being too vague and undefined, as well as lacking significant sanctions for non-compliance, to result in significant actions by corporations.[172]

The 2013 India CSR law mandates corporate donations of 2% of profits to a defined list of causes designated as CSR.[173] Under the law, companies are also required to create a policy for distribution of CSR funds.[174] While China has specific CSR provisions in its Company Law, recent activities have focused on the endorsement of CSR principles, development of CSR policies at the individual company level, and disclosure, rather than the imposition of specific, substantive obligations.[175]

III. Redefining CSR in an Era of Legalization

Our analysis of public and private CSR regulation has shown a trend towards hardening of CSR policies, from self-regulation, certification and labeling, to mandatory, substantive obligations. In this part, we analyze the impact of the increasing legalization and new realities on current concepts of CSR and the role of the firm in society. We do not suggest that the legalization of CSR is detrimental to CSR *per se*; however, our analysis suggests an associated global shift towards shareholder primacy, which might undermine well-intentioned public or private regulation unless it is accompanied by a renovation of the current understanding of CSR. We therefore finish by offering a new definition of corporate social responsibility that we believe may be necessary to counter current trends toward a shareholder-primacy driven notion of CSR.

A. CSR Regulation as a Window for Changing Social Norms

It may be tempting to assume that the increasing legalization, or hardening, of CSR represents a similar hardening of social norms regarding the moral and ethical obligations of corporations and their responsibilities to the societies in which they operate. New regulation, legal enforcement, or the mandatory imposition of CSR could reflect efforts to control negative externalities caused by globalization and to counter the increasing power of MNEs in society.[176] In the face of pressure from MNEs and international investors to adopt shareholder primacy norms, mandatory CSR could also be seen as a cultural resistance against globalization. The empirical

[171] Cornel B. Juniatro & Andika D. Riyandi, *Corporate Social Responsibility Regulation in Indonesia*, INT'L BAR ASS'N (Sept. 12, 2012), http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=103427a1-0313-4d6c-b7f7-c5deb0bedbb5. *See also* Waagstein, *supra* note 75, at 455–56, 459–60 (describing law and mandatory obligation).
[172] *See* Mahy, *supra* note 175, at 416; Waagstein, *supra* note 75, at 460–61.
[173] *See supra* note 95 and accompanying text.
[174] *See supra* note 94 and accompanying text.
[175] *See* Harper Ho, *supra* note 70, at 397–406. Harper Ho notes that China has also implemented a variety of other mandatory provisions, including establishment of enterprise risk management systems, internal controls, and environmental inspections, but these would fall outside of the definition of CSR utilized in this paper. *Id* at 406–07.
[176] *See* Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 860–61, 874–79 (2008) (identifying the power of transnational corporations to use their influence over government policies and to violate human rights as key reasons why transnational corporations are expected to take direct responsibility for human rights, and linking that responsibility to CSR activities); Caroline Van Zile, *India's Mandatory Corporate Social Responsibility Proposal: Creative Capitalism Meets Creative Regulation in the Global Market*, 13 ASIAN-PACIFIC L. & POL'Y J. 270, 276 (2012) ("International corporate social responsibility aims to address the problem caused by multinational corporate enterprises ('MNEs') operating in less-developed countries with insufficient regulation.").

support for such broad conclusions is elusive, if not impossible to produce.[177] Still, we have observed certain trends in the research related to CSR that may provide insight into the underlying motivation and goals of the legalization process we have observed.

First, as described in Part I.A., although legal scholars have rejected the notion that shareholder primacy is legally required, we find that the shareholder primacy norm continues to be firmly rooted in U.S. culture. As such, activities undertaken in the name of social responsibility are ultimately judged by their potential to generate value: if they do not create value, or if they conflict with the maximization of shareholder wealth, they will be vulnerable to challenge.[178] It should not be surprising then, that CSR regulation in the United States remains consistent with the notion of CSR as a tool for enhancing the value of the corporation.[179] The primary form of mandatory CSR regulation in the United States—disclosure—is particularly well adapted for value creation, as it provides corporations with opportunities to tout popular initiatives and build brand recognition for CSR initiatives in which the company chooses to engage.[180] Similarly, CSR regulations requiring disclosure of environmental risks and financial results provide a clear benefit to shareholders, while not requiring any additional accountability to other stakeholders.[181] The more literature and research dedicated to proving CSR builds brand value and enhances profits, the more CSR becomes associated with a notion of advancing shareholder interests, which ultimately strengthens shareholder primacy's already strong grip on U.S. norms.

In Europe, CSR developments point in contradictory directions. On one hand, CSR regulation is growing, and historically shareholder-oriented countries such as the U.K. are formally embracing the notion that corporate directors have obligations not only to shareholders but also to stakeholders.[182] On the other hand, as observed above, there is a trend in European corporate governance towards strengthening the position of shareholders against powerful management introducing the notion of shareholder value maximization into formerly stakeholder oriented

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[177] This difficulty may be tied to the importance of country-level factors in analyzing CSR trends. *See* Doh & Guay, *supra* note 22, at 70 ("We believe that . . . institutional differences among regions…will continue to influence the public policy process, as well as the manner in which corporations and their responsibilities to society are discussed, debated, and ultimately determined.); Minna Halme & Morten Huse, *The Influence of Corporate Governance, Industry, and Country Factors on Environmental Reporting*, 13 SCAND. J. MGMT. 137, 143 (1997) (noting country-level differences in concern about the environment, which may be influenced by "accounting regulations, governmental actions, national culture and the economy, the existence of pressure groups and the severity of the environmental problems"); Meng Zhao et al., *MNC Strategy and Social Adaptation in Emerging Markets*, 45 J. INT'L BUS. STUD. 842, 844 (2014) (concluding that multinational corporations need to adapt their CSR strategies to "stakeholder dynamics specific to local markets" to "avoid public crises and counterbalance negative consequences of economic adaptation"). Institutional theory and research suggests that a variety of local institutions, including social norms, government regulation, values, and expectations all play a role in the development of CSR, leading to difficulties extrapolating across countries. *See* Chung Hee Kim et al., *CSR and the National Institutional Context: the Case of South Korea*, 66 J. BUS. RES. 2581, 2582–83 (2013).

[178] *See supra* note 35-40 and 83.

[179] *See* Bondy et al., *supra* note 109; Gill, *supra* note 41, at 462; Stefan Tengblad & Claes Ohlsson, *The Framing of Corporate Social Responsibility and the Globalization of National Business Systems: A Longitudinal Case Study*, 93 J. BUS. ETHICS 653 (2010).

[180] *See* Mahfuja Malik, *Value-Enhancing Capabilities of CSR: A Brief Review of Contemporary Literature*, 127 J. BUS. ETHICS 419, 426–28, 432 (reviewing CSR literature and noting impact of CSR generally on firm value, and the impact of CSR disclosure in particular on value creation).

[181] *See* Triponel, *supra* note 176, at 878 (noting that increased disclosure requirements in the United States "has stemmed from the need to protect American investors in the wake of financial scandals"); Williams & Conley, *supra* note 39, at 523 (concluding, "[t]hus, the responsibility discussion in the United States to date has had the ironic effect of doing little more than further entrenching the idea of shareholder primacy").

[182] *See supra* note 39.

national European systems.[183] Interestingly, the new EU Non-Financial Disclosure Directive[184] amends the EU Accounting Directive,[185] directly linking CSR and financial reporting, which might be an indicator of an EU reaction to increasing importance of shareholder interests.

Williams and Conley note that the extent of the disclosure statutes adopted in specific EU Member States generally reflects the depth of that State's commitment to stakeholder theory.[186] A closer look at the domestic European CSR regulations reveals that differences in form and depth of these regulations may have other reasons than differences in the Member States' commitment to CSR. France, for example, has been a precursor in mandatory environmental disclosure regulation and has enacted a number of laws directly mandating CSR, while Germany has taken a more voluntary approach.[187] However historically, the "green" political movement in Germany has been more successful than in France,[188] and Germany is known for its strong stakeholder approach, which materializes for example in the German codetermination model.[189] Thus, while they certainly show political commitment to CSR, France's mandatory CSR laws could be explained by a stronger tendency in France to use regulation as a policy instrument to react to crisis and to guide people's or companies conduct more directly, rather than a particularly strong adherence to stakeholder theory.[190]

While we have seen trends in the United States and EU toward increasing private CSR regulation, these initiatives may not point toward any growing sense of moral or ethical duty on the part of firms. For example, when companies join together to develop industry-specific standards or principles that define socially responsible conduct,[191] these associations often are the result of environmental or social scandals, which affect an entire industry and not just one company.[192] By creating universal standards or principles that transcend an individual entity,

[183] *Supra* note 54–57 and accompanying text.
[184] *See supra* note 175 and accompanying text.
[185] Directive 2013/34/EU, of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, 2013 O.J. (L 182).
[186] Williams & Conley, *supra* note 39, at 510.
[187] *See e.g.*, the voluntary GSC, *supra* note 139 and in contrast Article 116 of the French Nouvelles Régulations Économiques (NRE), requiring French listed firms to report on the social and environmental impact of their activities in their annual reports, *see generally* Lucien J. Dhooge, *Beyond Voluntarism: Social Disclosure and France's Nouvelles régulations économiques*, 21 ARIZ. J. INT'L & COMP. L. 441, 443–44 (2004).
[188] *See generally* Ferdinand Müller-Rommel, *The Greens in Western Europe: Similar but Different*, 6 INTERNATIONAL POLITICAL SCIENCE REVIEW / REVUE INTERNATIONALE DE SCIENCE POLITIQUE 483 (1985); *see also* William M. Chandler & Alan Siaroff, *Postindustrial Politics in Germany and the Origins of the Greens*, 18 COMP. POL. 303, 322 (1986) (stating that in comparison to other green parties in Europe "it is in Germany where Green politics have prospered the most").
[189] *See* Gelter, *supra* note 56, at 698–99 (commenting on the relationship between codetermination and shareholder primacy in German corporate governance).
[190] *See* Eberhard Bohne, *Conflicts Between National Regulatory Cultures and EU Energy Regulations*, 19 UTILITIES POL'Y 255, 259 (2011) (comparing the British, French and German regulatory system).
[191] *See supra* Part II.A.2 on industry self-regulation.
[192] *See e.g.*, the chemical industry's association Responsible Care, AMERICAN CHEMISTRY COUNCIL: RESPONSIBLE CARE, https://responsiblecare.americanchemistry.com (last visited March 8, 2017); or the garment industry's Bangladesh Accord on Fire and Building Safety and Alliance for Bangladesh Worker Safety, which were created to monitor safety and working conditions in the garment industry after the Rana Plaza factory collapse, which killed more than 1,100 garment workers in Bangladesh in 2013. *See* SARAH LABOWITZ & DOROTHÉE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION, SUPPLY CHAINS AND SOURCING AFTER RANA PLAZA 10 (Apr. 2014),

companies create the appearance of a new "industrial morality" that allows them not only to restore a tarnished industry-wide reputation, but also to challenge past practices and develop new standards and procedures.[193] As such, industry self-regulation could be seen as a reaction to shareholder primacy. When an entire industry collectively accepts other values than maximizing profits, industry self-regulation may serve as moral, though not necessarily legal, legitimization for a company's management decision to pursue other goals than profit maximization.[194] This is especially true when the creation or control of the standards involves stakeholders other than the companies themselves, such as NGOs, employee associations, International Governmental Organizations (IGOs), local or national government.[195] The growing success of multi-stakeholder initiatives could be seen as evidence for this trend.[196]

While we also observe a growth in enforcement of voluntary codes or agreements formed on a unilateral basis, we note that this enforcement has taken place with reference to legal standards for consumer protection from deception, not through recognition of ethical or moral obligations of firms to society.[197] As such, this hardening of CSR, while notable from the firm's perspective, does little to further changes in social norms. Social and legal norms prohibiting deceptive behavior by corporations are not interchangeable with more generalized notions of corporation social responsibility, including stakeholder theory.

The motivation behind legislation explicitly labeled "CSR" in India, China, and Indonesia must be considered separately from the hardening of CSR in the United States and EU, as the trend toward modernization and development has brought to the developing regions global companies and western-style capitalism, along with a challenge to traditional values. The growth of hard law CSR obligations in these States suggests that cultures with strong traditions of corporate responsibility may feel pressure from globalization to maintain that tradition through legal structures. However, if the regulations mandate "business-case" CSR premised on increasing shareholder value, then, intentionally or not, they could result in an evolution *toward* shareholder primacy rather than a correction against it.[198]

In sum, while we have identified a trend toward the hardening of CSR, in most respects we have not found any clear indication that this trend furthers notions of corporate social responsibility to stakeholders other than shareholders. Rather, each of the hardening efforts we have observed allow CSR to be repackaged by MNEs and other corporate actors in a manner that builds

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http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf (concluding that both alliances are insufficient).

[193] *See* Gunningham & Rees, *supra* note 108, at 378 ("an industrial morality legitimizes aspirations other than profits as a good reason for action").

[194] Proponents of shareholder primacy could still argue that a management decision which favors social or environmental interests over shareholder interests may infringe on shareholder rights, *see* Bakan, *supra* note 109, at 287 (cautioning that despite the move towards CSR, the shareholder value approach continues to dominate United States corporate law).

[195] Abbott & Snidal, *see supra* note 131, at 46 (suggesting that private self-regulation will be most likely in the public interest when it involves stakeholders from each sector concerned); Roberts, *supra* note 108, at 71 (associating this approach with "a normative or prescriptive approach to stakeholder theory where more equitable outcomes are achieved by including all parties with a stake in those outcomes").

[196] *See* OECD, *supra* note 112, at 246 (providing multiple examples).

[197] *See supra* notes 121–24 and accompanying text.

[198] *See supra* notes 41-44, 89, 184, and accompanying text. Some scholars have hypothesized that international corporate law is generally trending toward a shareholder primacy model. *See generally* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); *c.f.*, Williams, *supra* note 35, at 712, note 15 (suggesting shareholder control of corporations is not so well established, even in the United States).

shareholder value. Given this trend, as well as the ongoing explicit efforts to tie CSR to value creation, it is understandable that consumers may be skeptical of corporate activities labeled CSR.[199] However, we also observe strong support by millennials for notions of corporate social responsibility, and in particular, the environmental responsibilities of firms.[200] Research suggests that firms do engage in CSR in response to stakeholder pressure,[201] suggesting that if millennials and other consumers put pressure on corporations to engage in more CSR activities, firms may change their behavior.[202] However, as long as cultural and legal presumptions of shareholder primacy are maintained, CSR activities will be limited by their ability to build firm value.

B. A New Definition of CSR

As CSR hardens and becomes more legalized, its role in business, and in society, will necessarily change. Against this background, definitions of CSR that focus on voluntarism or on a business case may undermine genuine corporate efforts and commitments, and make it difficult, if not impossible, to ensure that CSR is driven by an ethical and moral duty, rather than simply a rebranded way to increase corporate profits.[203] If the term CSR can signal either a moral duty or *no* moral duty, voluntary *or* involuntary actions, charity or *not* charity, it is of little use in providing guidance to corporate actors, corporate stakeholders, consumers, or even simply concerned citizens. Worse, it can be co-opted by those seeking to undermine the ethical component and replace it with a profit-seeking motive.

One source of contradiction and confusion in CSR definitions is that they can be used to answer very different questions. To begin, one may use the term CSR in a normative context to answer the question, *what responsibility does a corporation have to society, and how should a corporation operate in recognition of that responsibility?* The Carroll Model, for example, creates a physical representation of the author's assertion that, "[T]he total corporate social responsibility of business entails the simultaneous fulfillment of the firm's economic, legal, ethical, and philanthropic responsibilities. Stated in more pragmatic and managerial terms, the CSR firm should strive to make a profit, obey the law, be ethical, and be a good corporate citizen."[204]

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[199] *See* Alhouti et al., *supra* note 18, at 1242.

[200] *See* Ryan Rudominer, *Corporate Social Responsibility Matters: Ignore Millennials at Your Peril*, HUFFINGTON POST (Feb. 5, 2016), http://www.huffingtonpost.com/ryan-rudominer/corporate-social-responsi_9_b_9155670.html; Andrew Swinand, *Corporate Social Responsibility is Millennials' New Religion*, CHI. BUS., Mar. 25, 2014, http://www.chicagobusiness.com/article/20140325/OPINION/140329895/corporate-social-responsibility-is-millennials-new-religion.

[201] *See* Aguinis & Glavas, *supra* note 16, at 936 (reviewing multiple articles regarding predictors of CSR behavior, and finding institutional pressures, including pressure from stakeholders, to be prominent). Empirical research provides some clues as to the complex range of factors that underlie corporate engagement in CSR activities. One study found that firms engage in environmental initiatives based on three primary motivations: competitiveness, legitimacy, and ecological responsibility, while another found that the degree to which managers viewed environmental issues as "opportunities" correlated with their likelihood of adopting voluntary environmental strategies. *See* Pratima Bansal & Kendall Roth, *Why Companies Go Green: A Model of Ecological Responsiveness*, 43 ACADEMY MGMT. J. 717 (2000); Sanjay Sharma, *Managerial Interpretations and Organizational Context as Predictors of Corporate Choice of Environmental Strategy*, 43 ACADEMY MGMT. J. 681 (2000).

[202] *See supra* note 1, 200-201 and accompanying text. In contrast, an interesting 2010 study suggests that sustainability rankings do not lead to enhanced market performance, and similarly negative rankings do not "punish" lower performing entities. Cherie Metcalf, *Corporate Social Responsibility as Global Public Law: Third Party Rankings as Regulation by Information*, 28 PACE ENVTL. L. Rev. 145, 190–92 (2010).

[203] *See supra* Part I.

[204] Carroll, *supra* note 84, at 43.

Our study of the various definitions of CSR and the variety of CSR regulations leads us to conclude that Carroll's normative assertion would not be universally adopted, and even if it were, would likely be interpreted in vastly different ways depending on the country and firm in which it was applied. One firm might conclude that its ethical responsibilities end with obeying the law and making a profit. Others might conclude that the firm's only philanthropic duty is to support causes that enhance the corporation's brand and thereby increase profits. After accounting for these differences, the definition may become so generalized it provides marginal value to stakeholders, academics, or even corporate managers. The normative question—what moral/ethical obligation does a corporation owe to society?—is important, but in an international context, we suggest that the answer is too nuanced to allow for a universal definition that creates a common understanding from which businesses, consumers, and regulators can work.[205]

A second question that may be answered by a definition of CSR is, *what types of corporate activities should be labeled CSR for purposes of regulation, analysis, and disclosure to stakeholders?* Rather than providing a normative guide, this definition seeks to provide a guide to stakeholders seeking to understand what corporations are calling "CSR"; for regulators seeking to target legislation at corporate responsibility; and for researchers and scholars seeking to study the growth of CSR and meaning and impact of new CSR regulation.

We propose a new definition of CSR that seeks primarily to answer the second question but also that obliquely addresses the first. To wit:

> *Corporate Social Responsibility, as undertaken by a corporation or directed by a State, includes activities that internalize costs for externalities resulting directly or indirectly from corporate actions, or processes and actions to consider and address the impact of corporate actions on affected stakeholders, which are undertaken at least in part because of a recognized moral or ethical duty to society and stakeholders beyond the corporation's owner/shareholders.*

There are several key aspects to this definition.

First, it includes an explicit recognition that CSR activities must be undertaken, at least in part, in recognition of a moral and ethical duty by the corporation to stakeholders and society at large. While some individuals and corporations may be guided by a theory of shareholder primacy (rejecting the notion that corporations have a moral duty other than providing returns to shareholders) we believe these entities should not, then, also be permitted to adopt the term "corporate social responsibility" to describe their efforts or activities. We believe doing so can lead to confusion and skepticism among consumers and stakeholders, may provide a veil for the covert spread of shareholder primacy, and will ultimately undermine the very concept of social responsibility.

We redefine the term "corporate social responsibility" with an explicit nod to stakeholder theory because we believe it is necessary to counteract the growing presumption that corporations exist purely to maximize short-term profits.[206] As Chip Pitts suggests, the growth of CSR regulation has embedded notions of responsibility to stakeholders and ethical corporate behavior in a "new 'lex mercatoria and an emergent new 'customary global law'" that emphasizes social

[205] *See supra* note 177 and accompanying text.

[206] *See* Chip Pitts, *Pro-Social Corporate Value(s), Culture, and Purpose Before Profit, in Logic and Law*, 16 U.C. DAVIS BUS. L. J. 69, 69-71 (2015) (describing perception, particularly in Anglo-American world, that corporations exist to maximize short-term profits, and antecedent causes of that view).

and environmental sustainability and corporate social responsibility.[207] Yet if this new global law is reinterpreted simply as an extension of shareholder primacy, putting corporate profits above all other concerns and recognizing social responsibility only when it serves shareholder interests, it loses its power to enact real global and social change.

Our argument is buttressed by the scholars of law and business who have argued that corporations must go beyond shareholder primacy and actively take on moral and ethical responsibility for stakeholders and the environments in which they operate in order to address human rights violations and environmental degradation.[208] In an era of globalization, if the significant environmental and human rights issues posed by multinational corporations are to be addressed, the corporations themselves will have to take on ethical and moral responsibility; international and national law are simply incapable of such a level of regulation.[209] Stakeholder theory embeds social responsibility throughout corporate decision-making, ensuring the efforts to address impacts on stakeholders will not be considered only when profitable. Edward Freeman has gone so far as to suggest that "stakeholder theory makes the idea of corporate social responsibility 'superfluous' because 'stakeholders are defined widely and their concerns are integrated into the business process.'"[210] In this formulation, by embracing a stakeholder perspective, corporations would naturally act in sustainable and responsible ways.

The majority of consumers express a significant lack of trust in corporations. Only 44% of people in developed countries of North American and Western Europe see corporations as a source of hope for the future,[211] while only 21% have a "great deal" or "quite a lot" of confidence in big

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[207] *Id.* at 83-85.

[208] *See, e.g.*, Narine, *supra* note 155, at (page numbers unavailable) (arguing that disclosure and transparency are not enough to meaningfully impact human rights); Williams, *supra* note 35, at 708 ("Something more is needed than optimistic reliance on the theory of shareholder wealth maximization…"); Sjafjell, *supra* note 80, at 117 ("The great significance of the function of companies within the global economy and the vast impact that the operations of companies today have, on an aggregated level, on society in general and on the biosphere and the atmosphere, means that a critical analysis of the purpose of companies and the regulatory framework within which they operate is crucial to a deeper understanding of the correlation between society and sustainable development."); Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 363, 368 (2007) ("Reframing our understanding of the firm in accordance with a stakeholder-based relationship view is therefore consistent with both underlying legal principles and societal interests."); Reinhard Steurer et al., *Corporations, Stakeholders and Sustainable Development I: A Theoretical Exploration of Business-Society Relations*, 61 J. BUS. ETHICS 263 (2005) (suggesting that corporations must engage in stakeholder relations management in order to ensure sustainable development); Michael A. Berry and Dennis A. Rondinelli, *Proactive Corporate Environmental Management: A New Industrial Revolution*, 12 ACAD. MGMT. EXEC. 38 (1998) (asserting that environmental sustainability is a value adopted by the majority of companies, and that "proactive" environmental management is necessary to respond to environmental crises).

[209] The concept of corporations becoming so politically and economically powerful that they resemble states themselves has been referred to as "corporate sovereignty." Carl Rhodes, *Democratic Business Ethics: Volkswagen's Emissions Scandal and the Disruption of Corporate Sovereignty*, 37 ORG. STD. 1501, 1504 (2016). Rhodes notes that the independence of corporations has been encouraged by national governments, leading to a situation in which "[t]he corporate sovereign [] edges closer and closer to a position whereby it is 'monitored neither by international law nor by the legal norms of any particular state.'" *Id.* at 1504 (citations omitted).

[210] Laplume, *supra* note 28, at 1168 (citing R. Edward Freeman, *The Development of Stakeholder Theory: An Idiosyncratic Approach*, in GREAT MINDS IN MANAGEMENT: THE PROCESS OF THEORY DEVELOPMENT (K.G. Smith & M.A. Hitt, eds.) (2005)).

[211] Bourree Lam, *Quantifying Americans' Distrust of Corporations*, THE ATLANTIC (Sept. 25, 2014), https://www.theatlantic.com/business/archive/2014/09/quantifying-americans-distrust-of-corporations/380713/

business.[212] This lack of faith in corporations could ultimately undermine the social contract between business and society, which gives business license to function.[213] Adopting more CSR activities could be a way for corporations to enhance the sense of trust and confidence individuals have in them and reverse this trend, but if done the wrong way, or with the wrong intentions, it could also do precisely the opposite. Public perception of corporations, including significant skepticism about activities labeled as corporate social responsibility,[214] may be evidence that corporations trying to use CSR to build their brands while maintaining a strong commitment to shareholder primacy are doomed to failure.

It is not inevitable that consumers will doubt the efficacy and sincerity of corporate CSR efforts. Empirical data suggests that corporate reputation, which is based on a corporation's perceived relationships with stakeholder groups, may be enhanced by social philanthropy.[215] CSR may also act as a sort of "insurance" for a company's brand image in cases such as these: positive CSR has been shown to reduce the damage to a brand's reputation following a corporate failure.[216] On the other hand, researchers have found consumers will seek to "punish" corporations (through boycotts or other public acts, like signing petitions) for their failure to meet environmental standards.[217]

> When a company fails to be socially responsible by not complying with mandated standards, working around these standards or not meeting commitments they have voluntarily adopted, it can raise consumer suspicions regarding corporate intent and this situation can result in the development of an adversarial relationship between a business and its stakeholders.[218]

Perhaps most importantly, research suggests consumers do discriminate between CSR motivated purely by profit motives ("extrinsic CSR") and CSR motivated by selfless motives for doing good ("intrinsic CSR").[219] While intrinsic CSR leads to stronger customer loyalty and beliefs about a

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[212] Chris Cillizza, *Millennials don't trust anyone. That's a big deal,* WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/04/30/millennials-dont-trust-anyone-what-else-is-new/.

[213] *See* Russell et al., *Corporate Social Responsibility Failures: How do Consumers Respond to Corporate Violations of Implied Social Contracts?*, 136 J. BUS. ETHICS 759, 759-760 (2016).

[214] *See* TURKER ET AL., CONTEMPORARY ISSUES IN CORPORATE SOCIAL RESPONSIBILITY 60–61 (2014) (Discussing consumer skepticism of CSR initiatives: "When a company communicates about its CSR initiatives it is very likely that the initial response of the consumers will be one of suspicion . . . The effects of skepticism have been tested before and it has showed that the levels of skepticism on the motives of the company to be engaged in [CSR] are a main predictor of the ultimate success of a [CSR] campaign. [CSR] initiatives have a positive influence on the attitude toward the company when the motives are attributed as sincere. A negative effect was found when there was much skepticism, which also has an effect on the purchase intentions of consumers.") (citations omitted); *see also supra* note 18 and accompanying text.

[215] Stephen Brammer and Andrew Millington, *Corporate Reputation and Philanthropy: An Empirical Analysis*, 61 J. BUS. ETHICS 29, 30 (2005).

[216] *See* Jill Klein and Niraj Dawar, *Corporate Social Responsibility and Consumers' Attributions and Brand Evaluations in a Product-Harm Crisis*, 21 INT'L J RESEARCH MARKETING 203, 215 (2004).

[217] *See* Russell et al., *supra* note 213, at 767-768, 770.

[218] *Id.* at 761.

[219] Shuili Du et al., *Reaping Relational Rewards from Corporate Social Responsibility: The Role of Competitive Positioning*, 24 INT'L J. RESEARCH MARKETING 224, 226 (2007).

firm's CSR record, extrinsic CSR is more likely to be associated with skeptical beliefs about whether the firm is truly socially responsible.[220]

An excellent cautionary tale about the marriage between shareholder primacy and CSR is the still-unfolding scandal at Volkswagen. In September 2015, the Environmental Protection Agency sent automobile manufacturer Volkswagen a formal notice of violation that it had found significant evidence the company had "manufactured and installed defeat devices" in some of its vehicle models in order to circumvent requirements under the Clean Air Act.[221] This was the first public notice of what would lead to an initial $14.7 billion civil settlement in the United States, ongoing criminal charges and investigations, and additional multi-billion dollar settlements in both the United States and abroad.[222] This, despite the fact that Volkswagen was generally considered a leader in corporate social responsibility and sustainability, and was ranked as the 11th best company in the world for its CSR efforts.[223]

The scandal at Volkswagen was seen by some as evidence that today's CSR efforts represent little more than greenwashing and marketing.[224] Others urged that Volkswagen's story illustrates that CSR as it presently exist needs to be fundamentally changed,[225] and that socially responsible practices must be fully integrated into corporate operations or other companies risk similar results.[226] We believe the scandal at Volkswagen illustrates the challenge in attempting to deliver CSR in an environment that prioritizes profits and an overriding drive for growth. As Volkswagen's sustainability report claimed, "the Volkswagen group [integrates] traditional entrepreneurial business values with a modern understanding of responsibility and sustainability."[227] Many analysts of the scandal pointed to a relentless drive for profits and dominance of the market, coupled with an aggressive corporate culture that allowed no room for questioning of authority, as the cause of the ethical breakdown.[228] Linking the scandal at

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[220] *Id.*at 227. *See also* Karen L. Becker-Olsen et al., *The Impact of Perceived Corporate Social Responsibility on Consumer Behavior*, 59 J. Bus. Research 46, 48 (2006) ("when motivations are considered firm serving or profit-related, attitudes toward firms are likely to diminish; when motivations are considered socially motivated, attitudes toward firms are likely to be enhanced.").

[221] Letter Notice of Violation, Phillip A. Brooks, Director of Air Enforcement Division, Office of Civil Enforcement, Environmental Protection Agency (Sept. 18, 2015), https://www.epa.gov/sites/production/files/2015-10/documents/vw-nov-caa-09-18-15.pdf.

[222] *See* Jack Ewing, *Engineering a Deception: What Led to Volkswagen's Diesel Scandal*, NY TIMES (Mar 16, 2017), https://www.nytimes.com/interactive/2017/business/volkswagen-diesel-emissions-timeline.html.

[223] Matthew Lynn, *Corporate Social Responsibility Has Become a Racket-And a Dangerous One*, THE TELEGRAPH (Sept 28, 2015) (arguing that corporations should stop spending money on CSR and simply pay more in salaries and dividends), http://www.telegraph.co.uk/finance/newsbysector/industry/11896546/Corporate-Social-Responsibility-has-become-a-racket-and-a-dangerous-one.html.

[224] *See, e.g.,* Lauren Hepler, *Volkswagen and the Dark Side of Corporate Sustainability*, GREENBIZ (Sept 24, 2015) (noting a lack of accountability in sustainability reporting); Kelly Kollman and Alvise Favotto, *How VW took the Corporate Ethics Industry to the Brink*, THE CONVERSATION (Nov. 2, 2015) ("When a company can top the list of car firms in the Dow Jones Sustainability Index one week and then be caught using sophisticated software to avoid compliance with environmental regulation the next, we have to question if the concept of corporate social responsibility (CSR) has any meaning at all.").

[225] *See*, Enrique Dans, *Volkswagen and the Failure of Corporate Social Responsibility*, FORBES (Sept 27, 2015) (concluding, "The Volkswagen case shows in stark contrast that we must reinvent CSR.").

[226] *See* Kollman & Favotto, *supra* note 224; Richard Hardyment, *CSR After the Volkswagen Scandal*, TRIPLEPUNDIT (Oct 28, 2015) (calling for greater scrutiny of sustainability reports and noting that sustainability "must be properly integrated into a business").

[227] Lynn, *supra* note 223.

[228] Jack Ewing and Graham Bowley, *The Engineering of Volkswagen's Aggressive Ambition*, NY Times (Dec 13, 2015), https://www.nytimes.com/2015/12/14/business/the-engineering-of-volkswagens-aggressive-ambition.html;

Volkswagen and the revelation that ExxonMobile spent millions of dollars to fund climate change denial efforts, one commentator suggests it was the "relentless pursuit of size" along with a failure to recognize environmental externalities, that led to corruption and ethical failures.[229] Others have suggested that when corporations set unrealistic sustainability goals and communicate about them, as did Volkswagen, CSR programs can actually "foster[] corporate irresponsibility."[230]

Thus CSR holds the potential to help restore public confidence in corporations, but also to further undermine it. It may also, paradoxically, lead corporations to engage in dishonest or corrupt behavior, as corporations seek to deliver unsustainable results through deceptive means.[231] It is therefore essential that CSR be done "right"; we believe this means communicating openly and honestly about its ultimate intention, and not using the term "social responsibility" when what is really meant is "shareholder primacy."

While we believe it is inappropriate to label activities as CSR unless they reflect a moral or ethical commitment beyond profit-making and value creation, in recognition of the significant differences in opinion regarding the precise nature of that ethical responsibility, we do not seek to precisely define the nature of the moral obligation. Instead, we suggest that corporations seeking to label activities as CSR acknowledge that *they* recognize the existence of this ethical duty.

Second, we reject the inclusion of corporate value creation as a necessary component of CSR. Justifying or promoting CSR as a business method to increase profits creates a dynamic in which corporate actions, even those intended to serve society and fulfill a moral duty, will be judged by their profitability. In such an environment, "CSR" activities that are not profitable are less likely to be supported.[232] Corporations should not be discouraged from seeking "win-win" actions that increase profits and serve social ends. But CSR activities should not be defined by reference to their ability to increase value to the corporation. Here, we differ from Carroll[233] and those who would link CSR to the "triple bottom line" notion of sustainability, in which corporations become sustainable by accounting for impacts on people, planet (environment) *and* profits.[234] While we support the notion of the triple bottom line as a measure of for-profit corporate

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Lydia Dishman, *How Volkswagen's Company Culture Could Have Led Employees to Cheat*, FAST COMPANY (Dec 15, 2015) (noting that "theirs is a for-profit business, and money can change the ethical temperature of a culture pretty quickly"), https://www.fastcompany.com/3054692/how-volkswagens-company-culture-could-have-led-employees-to-cheat.

[229] Pavan Sukhdev, *VW and Exxon: Indicative of a Polluted Corporate Culture that must Change*, THE GUARDIAN (Dec 31, 2015).

[230] Alfonso Siano et al., *'More Than Words': Expanding the Taxonomy of Greenwashing After the Volkswagen Scandal*, 71 J. BUS. RESEARCH 27, 33 (2017).

[231] *Id*.

[232] *See supra* note 82 and accompanying text.

[233] Carroll, *supra* note 84, at 43 ("The CSR firm should strive to make a profit, obey the law, be ethical, and be a good corporate citizen."). It is worth noting that Carroll is somewhat unique in management scholars in his willingness to provide a normative argument for and definition of corporate social responsibility. A recent review in the Journal of Management titled *What We Know and Don't Know About Corporate Social Responsibility: A Review and Research Agenda*, which surveyed 588 journal articles, books and book chapters on CSR, focuses entirely on "predictors of CSR, outcomes of CSR, and mediators and moderators of CSR-outcomes relationships," not addressing the basic question of the normative ethical and moral responsibilities of corporations. Aguinis and Glavas, *supra* note 16, at 934. This, of course, reflects the orientation of the leading management journals, which publish empirical and theoretical pieces, rather than normative ethical or philosophical works.

[234] *See, e.g.*, James M. Roberts and Andrew W. Markley, *US Corporations Should Oppose International Corporate Social Responsibility Standards*, in CORPORATE SOCIAL RESPONSIBILITY (MARGARET HAERENS AND LYNN M. ZOTT, EDS.) 48-61, 50-52 (2014). "The new CSR mentality seeks, at its core, to redefine the very purpose of business…The [new] definition of CSR…coalesces around what proponents assert is a triple-bottom-line obligation

sustainability, and recognize that corporations owe a significant duty to shareholders and investors, we do not believe all social responsibility must include some measure of profitability. This devotion to corporate profits allows the company to pick and choose which ethical obligations it feels like addressing—and to only address the ones that happen to bring with them increased revenues. Meanwhile, there are numerous examples of companies that have announced they will not prioritize shareholder profits over social responsibility. Perhaps the easiest place to find these companies is by reference to those who have gained certification as a B Corp, including prominent B Corps Patagonia, Warby Parker, and Ben and Jerry's.[235] One of the few publicly traded B Corps, Etsy, is currently seeking to formally change its corporate designation to a benefit company, a move that will require shareholder approval.[236]

As noted above, focusing on this "business case" form of CSR can undermine and delegitimize the activities that corporations engage in. We therefore do not believe corporate value creation should be a defining component of CSR.

Third, our definition explicitly recognizes the importance of CSR activities that address corporate externalities. In a time of increasing globalization, corporate externalities impact communities far removed, both literally and figuratively, from consumers of corporate goods.[237] This disparity can put the interests of consumers in having cheap and plentiful goods at odd with the interests of communities that bear the impacts of externalities.[238] In defining CSR by reference to externalities and the impacts of corporate activities on stakeholders, we shine a light on this issue while also intentionally creating a boundary between CSR and corporate charity. While corporations engaging in charity can have a positive impact on society, we believe charity should be distinguished from a corporation's responsibility to consider and address the direct impact of its activities. We would define charity as activities intended to create social good or remedy some harm that is unrelated to an externality or impact of the business's activities.[239] Thus, while a corporation may support access to contraceptives for women in rural villages in Africa, if that

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of companies to deliver not only economic, but social and environmental 'returns' to their communities in order to justify a license to operate." *Id.* at 51. *See also* Aguinis & Glavas, *supra* note 16, at 933 (adopting the following definition of CSR: "context-specific organizational actions and policies that take into account stakeholders' expectations and the triple bottom line of economic, social, and environmental performance" (citation omitted)); Anna Tripodal, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT'L L. REV. 855, 877 (2008) (describing CSR in the United States as "business decision-making linked to ethical values…and respect for people, communities and the environment"); Lelia Mooney, *Promoting the Rule of Law in the Intersection of Business, Human Rights, and Sustainability*, 46 GEO. J. INT'L L. 1135, 1136 n.4 (asserting the that "core" of CSR "is the fact that corporations can achieve the bottom line by aligning their goals and business strategy to the environmental, social and governance concerns of the societies and communities they benefit from and work with.").

[235] For a discussion of benefit and B Corps, see notes 45-50 and accompanying text. For information about B Corps earning the highest rankings for their social and ethical commitments, see Ariel Schwartz, *The Best B Corps Might Just Be the Best Companies for the World*, FAST COMPANY (Apr 21, 2015), https://www.fastcompany.com/3045112/the-best-b-corps-might-just-be-the-best-companies-for-the-world.

[236] *See* Marc Gunther, *Why B Corporations are at a Crossroads*, GREENBIZ (Apr 19, 2017), https://www.greenbiz.com/article/why-b-corporations-are-crossroads

[237] *See, e.g.*, TONY ALLAN, VIRTUAL WATER: TACKLING THE THREAT TO OUR PLANET'S MOST PRECIOUS RESOURCE 176–77 (2011) (Discussing Chinese manufactured goods and the "[r]elatively cheap mass production of goods in China [as] one of the central planks of our current consumer binge in the developed economies.").

[238] *Id.* ("[F]or us to lecture China from our vantage point of comfort in the West is gross hypocrisy . . . We enjoy cheap goods and escape the water environment's consequences.").

[239] This definition is consistent with that suggested by Professor Sjafjell, who proposes that corporate charity work must be distinguished from CSR, with corporate charity work being unrelated to business activities, and CSR being integrated into company operations. *See* Sjafjell, *supra* note 80, at 119–20.

cause is entirely unrelated to the corporation's activities, our definition would characterize this activity as charity rather than CSR. On the other hand, if the corporation sought to provide access to health care to its employees, or used corporate funds to clean up a river polluted by corporate activities, we would consider these actions CSR.[240]

Fourth, we explicitly remove from our definition any reference to whether actions are voluntary or involuntary. This voluntary/involuntary characterization engenders more confusion than it helps to resolve because it creates an implicit assumption that corporations have no common moral or ethical responsibility. It also creates a false dichotomy between legal and regulatory actions and discretionary corporate activities.

Corporate externalities are, by definition, impacts of corporate activities that are not included in the cost of goods;[241] these side effects of corporate activities, including various forms of environmental degradation, are either not regulated or regulated in such a manner that the corporation is not responsible for them.[242] Corporate efforts to internalize the cost of externalities would therefore be voluntary, simply by definition. Thus by focusing on externalities we capture the important notion of corporations voluntarily addressing the impacts of their activities that are not already included in the cost of their goods, without undermining regulatory or legal activities that might also address those impacts.

Conclusion

The role of CSR in society and business is changing rapidly. In the past ten years, new mandatory duties have been created across the globe that have either been explicitly labeled as CSR or are widely accepted as such. Private regulation, such as self-regulation, certification or labeling has been enforced through social pressure from consumers or investors or by legal means, leading to the increasing legalization of CSR. Yet as noted above, the study and public understanding of this expanding concept is limited by the contradictory ways in which it has been defined and conceived. The fact that a corporation adopts a CSR policy in this context tells us little about the position of the corporation vis-à-vis the notion of the corporation's moral or ethical duty to society. A CSR policy may be motivated by economic or societal pressure, the need to fulfill legal obligations, or a perceived ethical duty to society. The "harder" the law, the more difficult it becomes to discern the true motivation behind a company's CSR policy.

While it may be tempting to view the hardening of CSR as a global shift *away* from shareholder primacy, our research suggests this is not the case. Though the hardening of CSR and increasing regulation may represent a form of pushback or resistance to shareholder primacy in some regions, new definitions of CSR suggest that, at a minimum, understandings of CSR are increasingly linked to the notion of shareholder value creation. Moreover, we observe that new regulations enable corporations to focus their CSR efforts on those areas that will ultimately serve to increase profits. To the extent that social norms support a conception of the firm's social

[240] This distinction is supported by empirical research that suggests CSR initiatives are more likely to be viewed as genuine and authentic if they are aligned with the firm's brand, identity and product line. *See* Alhouti et al., *supra* note 18, at 1244, 1246.

[241] *See* Thomas Helbling, *What Are Externalities?* INT'L MONETARY FUND FIN. & DEV. (Dec. 2010), http://www.imf.org/external/pubs/ft/fandd/2010/12/pdf/basics.pdf.

[242] *See* PAUL E. HARDISTY, ENVIRONMENTAL AND ECONOMIC SUSTAINABILITY, 49–52 (2010) (discussing corporate externalities); MARC J. EPSTEIN, MAKING SUSTAINABILITY WORK: BEST PRACTICES IN MANAGING AND MEASURING CORPORATE SOCIAL, ENVIRONMENTAL, AND ECONOMIC IMPACTS, 143–62 (2008) (discussing corporate accounting systems that would include social and environmental impacts).

responsibility to society to extend beyond shareholders, these new developments in international understandings of CSR are troubling, to say the least. If CSR is to retain its ethical and moral normative component, we believe changes will have to be made in the definition and popular understanding of this concept. We hope the new definition of CSR that we propose will begin this process.